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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 41

C. E. STEVENS COMPANY, C. E. STEVENS TACOMA COMPANY AND C. E. STEVENS COMPANY OF OREGON, PETITIONERS,

vs.

FOSTER & KLEISER CO., GEORGE W. KLEISER, P. FOSTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 3, 1940.

CERTIORARI GRANTED MAY 6, 1940.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 23, 1940.
—9420

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20755

C. E. STEVENS COMPANY, a corporation; C. E. STEVENS TACOMA COMPANY, a corporation; and C. E. STEVENS COMPANY OF OREGON, a corporation,

Plaintiffs,

vs.

FOSTER & KLEISER CO., a corporation; GEORGE W. KLEISER; WALTER P. FOSTER; ALBERT MORTENSON; GILMAN HAYNES; RESTOP REALTY CO., a corporation; GERALD O'NEIL; LYLE ABRAHAMSON; PAUL DUEBER; WALTER STEVENS; and GEORGE SMITH,

Defendants.

SECOND AMENDED COMPLAINT

Action for Damages Under Act of Congress Approved July 2, 1890, Sherman Antitrust Act.

Plaintiffs, C. E. Stevens Company, C. E. Stevens Tacoma Company, and C. E. Stevens Company of Oregon, complain of defendants, and allege for their causes of action:

First Count

I.

That plaintiff, C. E. Stevens Company, is now, and ever since March 8, 1924, and at all times herein mentioned has been, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Washington, having its principal place of business located at Seattle, King County, State of Washington. That ever since the said date plaintiff has been engaged in the business of outdoor advertising in said State of Washington and other states of the United States, and has been at all times engaged in interstate commerce between the various states of the United States, as will more fully appear hereinafter. [2]

II.

That plaintiff alleges that the C. E. Stevens Company is the parent company, and that C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon are subsidiaries of the parent company, functioning principally as branch offices of the parent company, and that plaintiff, C. E. Stevens Company, owns over 85% of the common voting stock of plaintiffs, C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon, respectively; that C. E. Stevens and Roy S. Marshall own the majority of the common voting stock of the plaintiff, C. E. Stevens Company; that C. E. Stevens and Roy S. Marshall control and manage the busi-

ness activities of all three plaintiff companies, and that all business activities relating to the C. E. Stevens Tacoma Company and C. E. Stevens Company of Oregon are directed through the C. E. Stevens Company; and that C. E. Stevens and Roy S. Marshall are the president and vice-president, respectively, of all three plaintiff companies.

That plaintiff company has at all times mentioned herein engaged in the outdoor advertising business, that is to say, has been engaged in the solicitation of, entering into, and execution of poster advertising contracts, painted bulletin display contracts, painted wall display contracts and commercial sign contracts from advertisers, representatives of advertisers, or advertising agencies located throughout the states of the United States. That in almost every case the said contracts are agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one of the states of the United States to another state for the primary purpose of posting the said posters or lithographs or painting signs from the designs or stencils upon billboards by paint panels supplied by the plaintiff company. That [3] it is within the contemplation of all the parties to the said contracts that the posters or lithographs or paintings from designs or stencils be placed or painted upon a stated number and class of billboards or paint panels and, in many

cases, that they be placed or painted upon certain specified billboards or paint panels, and that unless and until they are so placed or painted the said contracts are executory and incomplete. That in execution of the said contracts the said posters or lithographs have been and are shipped from one of the United States to another state solely to be placed upon a stated number and class of billboards and, in many cases, to be placed upon certain specified billboards, which are the property or within the control of the plaintiff company, and are at all times within the contemplation of the parties to the said contracts. That in execution of the said contracts the said designs, stencils and other advertising materials have been and are shipped from one of the United States to another state solely to be used in painting certain advertising signs upon a stated number and class of billboards or paint panels and, in many cases, upon certain specified billboards or paint panels, which are the property of or within the control of the plaintiff company, and are at all times within the contemplation of all the parties to the said contracts. That, at all times, it is also within the contemplation of all the parties to the said contracts, that unless and until the said posters or lithographs or paintings from the said designs or stencils are placed or painted upon the pre-determined and stated number and class of billboards or paint panels, as aforesaid, the primary consideration for each entire contract has not been

performed and each said contract remains executory and incomplete. That by thus engaging in the outdoor advertising business the said plaintiff company has been and is engaged in [4] interstate commerce between the several states of the United States.

III.

That defendant Foster & Kleiser Co., is a corporation organized and existing under the laws of the State of Nevada, and duly authorized and qualified to engage in business in the States of Oregon, Washington, California and Arizona, and at all times herein mentioned was engaged in the business of outdoor advertising in the said States of Oregon and Washington, California and Arizona, and other states of the United States, that is to say, has been engaged in the solicitation, entering into, and execution of poster advertising contracts, painted bulletin display contracts, painted wall display contracts and commercial sign contracts from advertisers, representatives of advertisers, or advertising agencies located throughout the states of the United States. That in almost every case the said contracts are agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one of the states of the United States to another state for the primary purpose of posting the said posters or lithographs or painting signs from the said designs or stencils upon billboards or paint panels supplied by the said de-

fendant company. That it is within the contemplation of all the parties to the said contracts that the posters or lithographs or paintings from designs or stencils be placed or painted upon a stated number and class of billboard or paint panels and, in many cases, that they be placed or painted upon certain specified billboards or paint panels, and that unless and until they are so placed or painted the said contracts are executory and incomplete. That in execution of the said contracts the said posters or lithographs have been and are shipped from one of the United States [5] to another state solely to be placed upon a stated number and class of billboards and, in many cases, to be placed upon certain specified billboards, which are the property or within the control of the said defendant company, and are at all times within the contemplation of the parties to the said contracts. That in execution of the said contracts the said designs, stencils and other advertising materials have been and are shipped from one of the United States to another state solely to be used in painting certain advertising signs upon a stated number and class of billboards or paint panels and, in many cases, upon certain specified billboards, or paint panels, which are the property of or within the control of the said defendant company and are at all times within the contemplation of all the parties to the said contracts. That, at all times, it is also within the contemplation of all the parties to the said contracts, that unless and until the said posters or lithographs or paintings from

the said designs or stencils are placed or painted upon the pre-determined and stated number and class of billboards or paint panels, as aforesaid, the primary consideration for each entire contract has not been performed and each said contract remains executory and incomplete. That by thus engaging in the outdoor advertising business the said defendant company has been engaged and is engaged in interstate commerce between the several states of the United States. That said defendant, Foster & Kleiser Co., has its principal place of business in the City of San Francisco, and branch offices at Seattle and Tacoma, State of Washington; Portland and Medford, State of Oregon; Oakland, Los Angeles, Sacramento, Fresno, Long Beach and San Diego, State of California; Chicago, State of Illinois; and New York City, State of New York.

That George W. Kleiser, its president, is a citizen of [6] the United States and a resident of San Francisco, State of California.

That Walter P. Foster, its vice-president, is a citizen of the United States and a resident of San Francisco, State of California.

That Albert Mortenson, its treasurer, is a citizen of the United States and a resident of San Francisco, State of California.

That Gilman Haynes, its general lease manager, is a citizen of the United States and a resident of San Francisco, California.

That Restop Realty Co. is a corporation organized and existing under and by virtue of the laws of the State of California, and is qualified to do business in the State of Washington, and is and was at all times mentioned herein, engaged in the business, among other things, of owning, holding and leasing real property and outdoor advertising sites in and among the Pacific Coast States of Oregon, Washington, California and Arizona, including the cities of Seattle, and Tacoma, Washington, and Portland, Oregon. That more than 50% of the voting stock of the said defendant, Restop Realty Co., is owned and controlled by the defendant corporation, Foster & Kleiser Co., and the officers and directors of the said defendant corporation, Foster & Kleiser Co. That defendant, Foster & Kleiser Co., and the officers and directors of said Foster & Kleiser Co. have been and at all times herein mentioned were in control and domination of said defendant, Restop Realty Co., and have at all times herein mentioned been and now are the motivating force of all acts of said defendant, Restop Realty Co.

That defendant Gerald E. O'Neil, its Seattle Branch office manager, is the statutory agent for said Restop Realty Co. in [7] the State of Washington. That Gerald E. O'Neill is a citizen of the United States and a resident of Seattle, Washington.

That Lyle Abrahamson, its Tacoma Branch office manager, is a citizen of the United States and a resident of Tacoma, State of Washington.

That Paul Dueber, its Portland Branch office manager, is a citizen of the United States and a resident of Portland, State of Oregon.

IV.

That for many years last past, and up to and including the date of the filing of the original complaint herein, Foster & Kleiser Co. has been continuously engaged in the business of outdoor advertising, as heretofore defined and explained. In conducting this business Foster & Kleiser Co. and Restop Realty Co. have owned and leased parcels of real estate in desirable locations in cities, towns and rural districts throughout the states of Washington, Oregon, California and Arizona, which states are hereinafter collectively referred to as the Pacific Coast Area. They have erected and maintained on said parcels of real estate numerous structures of wood and metal designed to display advertisements.

Great numbers of such advertisements have been in the form of lithographs which have been pasted or otherwise affixed to the face of said structures. These lithographs have been manufactured or printed by certain individuals, firms and corporations, hereafter referred to as lithographers, located in states other than those which comprise the

Pacific Coast Area, principally in the states of Kentucky, Ohio and Illinois. Said Foster & Kleiser Co. has been soliciting and entering into many thousands of contracts for the display of advertising matter upon said structures with persons, firms and corporations located [8] throughout the United States, and hereinafter referred to as advertisers, desirous of promoting the sales of their respective goods, wares and merchandise throughout the Pacific Coast Area. For the most part said advertisers have been located in states other than those comprising the Pacific Coast Area and are too numerous otherwise to identify herein. Many thousands of such contracts and arrangements have been made and are now being performed between Foster & Kleiser Co. and said advertisers for the shipment and transportation of lithographs from said lithographers to the said branches maintained as aforesaid by Foster & Kleiser Co. throughout the Pacific Coast Area, for the primary purpose of placing the said lithographs upon a stated number and class of billboards and, in many cases, of placing the said posters or lithographs upon certain specified billboards, as aforesaid. Pursuant to said contracts and arrangements, many thousands of lithographs have been and are being shipped and transported by said lithographers or advertisers located in places other than those comprising the Pacific Coast Area to the said branches maintained by Foster & Kleiser Co. throughout the Pacific Coast Area for the primary purpose of placing the said posters or lithographs

upon a stated number and class of billboards, and, in many cases, of placing the said posters or lithographs upon certain specified billboards, as aforesaid. Large numbers of said advertisements have been painted directly on the face of the billboards or paint panels through the medium of designs or stencils shipped from one of the states of the United States to another state for the primary purpose of being used to place the said advertisements upon a stated number and class of billboards or paint panels and, in many cases, upon certain specified billboards or paint panels, as aforesaid. [9]

V.

The work done under contracts with advertisers for bill-posting in the city or town in which the advertisers are located is known as "local work."

The work done under contracts between advertisers and bill-posters in various localities, either in the same state or in different states from that in which the advertiser does business, is known as "national work."

National work is in most instances done for the advertisers located in a different state or country from that in which the posting work is done. Both national and local work usually involve the sending of the posters in interstate or foreign commerce.

From about the year 1902 up to and including the date of the filing of the complaint in this action, a number of persons, firms and corporations, includ-

ing Foster & Kleiser Company, have been continuously engaged in the business of operating outdoor advertising plants, as aforesaid.

Persons, firms and corporations thus engaged are referred to herein in this second amended complaint, and in the trade, as "plant owners."

The operation of outdoor advertising plants includes the maintenance of two kinds of plants, (1) a poster plant, and (2) a paint plant.

A poster plant consists of a system of billboards or poster panels, either built as separate structures or attached to buildings, walls, fences or other structures, under common ownership, and used for the sole purpose of exhibiting thereon outdoor advertising posters or lithographs which are transported in interstate commerce.

For the purpose of contracting for advertising displays, [10] poster boards or panels, are arranged in groups consisting of substantially an equal number of illuminated and unilluminated boards distributed throughout a particular city or town, or in a particular section of a city or town, which group is referred to as a "showing."

A "showing" is intended to provide an outdoor advertising display in substantially all places available and desirable in a particular city, town, or village having advertising value. Showings are subdivided into full, half or quarter showing, depending upon whether the advertiser contracts for a display on all of the panels of a particular group of panels, or a half or a quarter thereof.

The usual and customary sales unit for poster advertising is a quarter showing which represents a definite number and class of billboards or poster panels.

A paint plant consists of a system of one or more signboard panels, or bulletin boards, either built as separate structures, or attached to building walls, fences or other structures, under common ownership, and used for the purpose of painting thereon designs or copy for outdoor advertising matter which are transported in inferstate commerce. Each separate board or panel is usually located at some conspicuous point near a public highway, by which traffic is continually passing.

The structures comprising a plant in practically all instances are located upon property leased by the plant owner at a rental much less than the rental value of the property for other than advertising purposes.

Advertising leases usually and customarily contain a provision that if the property is sold or is leased or used for other than advertising purposes the advertising lease may be cancelled. [11]

Persons, firms and corporations who solicit outdoor advertising contracts, and perform the activities in connection therewith, hereinafter set forth, are referred to and called in the trade "advertising agencies." Said persons, firms and corporations are hereinafter referred to in this second amended complaint as "agencies".

Contracts for the execution of outdoor advertising displays are secured from advertisers by solicitation by plant owners, by agencies, and by national solicitors appointed by the Trade Association hereafter referred to.

When secured by agencies they are executed upon the plants of plant owners throughout the territory to be covered; when secured by plant owners the portion of said contract to be executed upon the plant of the plant owner securing the contract is executed by such plant owner and the remainder is placed for execution upon the plants of others. This is called in the trade "sub-letting." A commission is paid to agencies by the plant owners on business secured from such agencies and to other plant owners on sublet business. When secured by national solicitors, they are executed exclusively on association plants as hereafter described.

VI.

The solicitation of outdoor advertising contracts involves:

(a) The preparation and submission to advertisers of advertising copy or designs by reproduction, either in print or in paint on signboards, walls, or panels constructed for that purpose;

(b) The procurement from lithographers, and the submission to advertisers, of estimates covering the cost of printing posters; [12]

(c) The procurement primarily through the association or associations hereafter mentioned,

from poster plant and paint plant operators of statistical information concerning the location of poster plants and paint plans in the various towns, and cities throughout the United States, as well as the charges for displays thereon, and the submission to prospective advertisers of estimates of the cost of displaying advertising matter on such plants;

(d) Entering into the contracts, either as principal or as agent for the advertiser, for the purchase of advertising posters pursuant to copy or designs approved by the advertiser, and the subsequent transportation and delivery of the same in interstate commerce from the lithographer to the operators of poster plants located in cities, towns and villages throughout the United States consigned to a stated number and class of billboards and/or paint panels, and, in many cases, to certain specified billboards and/or paint panels for posting in accordance with the instructions of the advertiser;

(e) Entering into a contract, either as principal or as agent for the advertiser, with operators of poster plants and paint plants, for the display of poster and painted advertising matter which is to be transported in interstate commerce in accordance with the advertiser's instructions;

(f) Causing the approved copy or designs for painted signs to be transported in interstate commerce from the office or studio of the advertiser or his agent, to operators of paint plants in the various cities and towns throughout the United States consigned for reproduction on a stated number and

class of paint panels, and, in most cases, on certain specified paint panels, in accordance with the advertiser's directions;

(g) Checking and inspecting the displays of advertising [13] matter on the poster and paint plants which have been selected by the advertiser or by the solicitor on its behalf;

(h) Making payments to the operators of the poster plants and the paint plants for the use of their plants; and

(i) Collecting from the advertisers for all services rendered.

The posting of a bill or poster upon a billboard involves three different parties and two different transactions; usually the advertiser either directly or through his agency contracts with the lithographer for the making of all the posters that the advertiser desires to use. The advertiser then either personally, or through the agency, contracts with the plant owners in the localities which the advertiser desires to reach for the placing of these posters upon a stated number and class of billboards, and, in many cases, upon certain specified billboards. The advertiser then may either direct the lithographer to forward the posters to the various plants or may have the lithographer deliver them to his or its representatives, and have them forwarded to the plants. The lithographer usually is located in a different state from the advertiser who employs him to prepare the posters. Both the advertiser and the lithographer are usually located in different states

from the plants upon which the posters are placed.

Sometimes lithographers of their own initiative prepare a form of poster to be used generally by numerous advertisers in a certain line of business. In such cases large numbers of these posters are printed in exactly the same form. A blank space is left on each poster for the insertion of the individual name, etc., of each particular advertiser purchasing the poster. These are called in the trade "stock posters."

The cost of having a special design for a poster is so [14] large as to make the cost of each poster almost prohibitive when that expense is distributed only among a small number of persons, firms or corporations. Small advertisers, therefore, find it greatly to their advantage to buy these stock posters. Stock posters are purchased by local plant owners and by advertisers located in every state of the United States and elsewhere, from lithographers located at various points in the United States. They are usually purchased for use in one locality only.

VII.

The defendant, Foster & Kleiser Co., prior to the year 1915 was engaged in the outdoor advertising business, as heretofore defined and explained, principally in the states of Oregon and Washington. In the year 1915, said defendant expanded said business of outdoor advertising into the State of California. At about the time of expanding into California, said Foster & Kleiser Co. formulated and

entered into a plan, scheme and conspiracy with divers and sundry other persons, firms and corporations whose names, except as hereinafter alleged, are to the plaintiff company unknown, but whose names are known to said Foster & Kleiser Co., defendant herein.

VIII.

The purpose and object of said plan, scheme and conspiracy was to attempt to monopolize and by various acts and means taken individually, in concert with the organizations and by and through the means and methods hereafter set forth, to monopolize in the Pacific Coast Area all branches of the outdoor advertising business, which business has hereinabove been described and particularly to prevent plaintiff and other independent plant owners from engaging in the posting business, from securing and executing contracts for national posting business, from securing posters with which to conduct either national or [15] local posting business; to prevent lithographers from supplying posters either to independent plant owners or advertisers who were customers of independent plant owners; and to prevent independent plant owners from securing adequate, sufficient or proper plant facilities whereby said independent plant owners could furnish a satisfactory advertising service to advertisers. Wherever used in this complaint, the terms "independents," "independent plant owners," "independent plants" and "independent companies"

include and are intended to embrace the appropriate plaintiff company.

The general plan, scheme and conspiracy was to effect such monopoly by:

1. Monopoly of the business of national outdoor advertising at its source through control of the agencies and organizations selling the same.

2. Prevention of and restraint upon shipment of posters to independent plants in interstate commerce.

3. Prevention of and restraint upon the sale of posters to advertisers for shipment in interstate commerce to, or display upon independent plants.

4. Prevention of and restraint upon the soliciting, securing and completing of outdoor advertising contracts, as heretofore defined and explained by the plaintiff company and other competitiors, by means of various unfair, predatory and illegal acts more fully set forth hereinafter in paragraph XV.

IX.

The defendant, Foster & Kleiser Co., at all times from and after its organization, has been continuously and now is furthering and carrying out said plan, scheme and conspiracy.

All the acts, occurrences and facts hereinafter set forth were done and performed by said defendant, Foster & Kleiser Co., and Restop Realty Co., and their agents and employees, for the purpose of furthering, carrying out and completing said plan, scheme and conspiracy. [16]

X.

The "Association" herein referred to is the Outdoor Advertising Association of America, Inc., a corporation. Said Association is a consolidation of the following corporations:

1. The Associated Bill Posters and Distributors of the United States and Canada, which was a corporation organized under the laws of the State of New York in 1897. In 1906 the name of the said association was changed to the Associated Bill Posters and Distributors of the United States and Canada. In 1912 it was again changed to Poster Advertising Association, Inc. It was an association of poster plant owners, and its functions and purposes are hereinafter more particularly described.

2. The Outdoor Advertising Association of America, which was an association of paint plant owners organized prior to the year 1916, the exact date of which is unknown to plaintiff, but is known to defendant.

On or about March 25, 1927, the said associations were consolidated under the name of Outdoor Advertising Association of America, Inc., and said corporation, Outdoor Advertising Association of America, Inc., has been and now is the incorporated association of the paint plant operators and the poster plant operators.

The memberships in these associations, did, before consolidation, and do now, consist of separate display plants located in separate cities, towns and villages throughout the United States, including the

Pacific Coast Area. There is only one membership for each separate city, town or village. Voting in the affairs of the association, prior to consolidation was, and since consolidation is according to the number of separate display plants owned or operated by the voting members. [17]

Foster & Kleiser Co. has at all times since it has been engaged in the business of plant ownership and operation, exclusively operated association plants. Membership in the said association and associations is termed or demnominated a franchise. Foster & Kleiser Co. has held the exclusive franchise in the cities, towns and villages in which it has operated its plants on the Pacific Coast during all the time that it has been engaged in the business. As its business increased, due to the acquisition of other plants, by purchase as hereinafter alleged, it finally acquired some six hundred (600) plants, each having membership in said association or associations on the Pacific Coast, and thus acquired the asociation membership or franchises in all the Pacific Coast Cities, towns and villages, save and except the towns of Richmond and Modesto, Imperial County, California; and Spokane, Washington, and it became, was and is the second largest franchise holder in said association and associations in the United States.

Plants whose owners hold a franchise or membership in these associations are referred to in the trade, and hereafter in this complaint as "association plants." Other plant owners are referred to in

the trade, and hereafter in this complaint, as "Independent plants," and sometimes as "opposition plants."

The said conspirators, by and through action of said association, threatened to refuse and did, in fact, refuse to post lithographs if the manufacturers of said lithographs sold or furnished lithographs for posting upon independent plants or if said lithographers furnished samples of posters to independent plants. Said action of the conspirators and of said association was taken for the purpose of coercing and intimidating, and it did, in fact, coerce and intimidate lithographers and was for the further purpose of hampering and preventing [18] independent plant owners, including the plaintiff, and other competitors of the association plants and of the conspirators from securing samples of lithographs and posters, and of securing lithographs and posters; that thereby the said independents were obstructed and hindered in their business, and prevented from giving a full and adequate outdoor advertising service to their customers, competition with the association members and said conspirators was hindered and obstructed, and the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained.

By and through said association or associations, advertisers were intimidated by the said association plants and the said conspirators, in that the said

association plants and the said conspirators threatened to, and did, in fact, refuse to post the posters and lithographs for advertisers if the said advertisers patronized or made contracts with independent plants for the display of their advertising.

The said association or associations limited the number of members in such association or associations so that there should be, was, and there is, but one poster plant, and one paint plant membership or franchise in each city, town or village of the United States, thereby preventing potential and actual competitors of the association members and the said conspirators from making use of the facilities provided by the association, from receiving the benefits of membership in the association, from competing with the association plants and the conspirators on equal terms, and preventing said independent plants, including the plant of the plaintiff from making use of the facilities provided by the association, to publish to advertisers and agencies statistical data concerning independent plants, including the [19] plant of the plaintiff, which publication is essential to obtain contracts for displays of national outdoor advertising.

At all times herein mentioned down to the date of filing the complaint herein, the said associations, association plants and said conspirators refused to execute any portion of contracts for outdoor advertising, any part of which had been or was to be executed upon an independent plant; refused to sublet any outdoor advertising which could not be executed

by the association plant owner securing the contract to an independent plant; refused to execute or accept the subletting of any part of a contract for outdoor advertising secured by an independent plant, whereby the said independents, including the plaintiff, were and are hampered and restricted in their business and prevented from competing on substantially equal terms with the said conspirators and with the said association plants in carrying on the business of outdoor advertising.

The said association charged excessive and prohibitive prices, to-wit: the sum of Twenty-five Hundred ($2,500.00) Dollars, per year, for furnishing the statistical data hereinabove referred to, to independent plants, independent agencies, independent solicitors, and non-bureau agencies, and charged a lesser and reasonable price for said service to their member plants, to association licensed solicitors.

Said association licensed exclusive solicitors, sometimes called National Solicitors, to solicit outdoor advertising contracts to be executed on association plants. Said solicitors were prevented by action of the association and of the conspirators, from soliciting contracts to be executed in any part [20] whatsoever on independent plants, and on the other hand, the association plants refused to post any outdoor advertising display unless the contract therefor came through a licensed solicitor of the association.

In the case of each action of the conspirators and/or the association, heretofore set out in Para-

graph X, the said action was taken in furtherance of the plan, scheme and conspiracy to monopolize the outdoor advertising business, as heretofore referred to, and was for the purpose of coercing and intimidating, and it did, in fact, coerce and intimidate advertisers, lithographers and competitors of defendant, and was for the further purpose of hampering and preventing independent plant owners, including the plaintiff and other competitors of the association plants and of the conspirators, from entering into and executing outdoor advertising contracts as aforesaid; that thereby the said independents were obstructed and hindered in their business and competition with the association members and said conspirators, and the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained.

In or about the year 1917 the solicitors holding licenses or franchises from the association formed an association or company known as "Poster Advertising Company, Inc."

XI.

Prior to about the year 1915 practically all outdoor advertising was sold by the solicitors licensed by and through the association and by the sales departments maintained by the plant owners. From the year 1915, or thereabouts, the practice of placing outdoor advertising contracts through advertising agencies became increasingly general, and

about the year 1918 it had become an important factor in the business. At or about [21] that time, to-wit: the year 1918, the National Outdoor Advertising Buearu was formed.

The National Outdoor Advertising Bureau, Inc., hereinafter referred to as "The Bureau", is a corporation organized and existing under and by virtue of the laws of the State of New York. It is engaged in the business of aiding and assisting its stockholders and others employing its services in soliciting and executing contracts for national outdoor advertising. The stockholders in the Bureau, called "Bureau members", are engaged in conducting advertising agencies. That part of the business of these stockholders and others employing the services of the Bureau which relate to outdoor advertising is under the direction and supervision of the Bureau, which maintains offices in the City of New York; Chicago, Illinois; San Francisco, California; and elsewhere throughout the United States, including the Pacific Coast Area.

Members of the Bureau constitute practically all of the large advertising agencies in the United States, and have offices in all the largest cities and towns throughout the United States, including the Pacific Coast.

The agencies composing the said Bureau became members thereof under and by virtue of a stock option purchase agreement. All of the capital stock of said Bureau was held by George C. Sherman, Frederick J. Ross, and William D. McJunkin, trus-

tees for the Bureau, and for those purchasing options upon the capital stock of the Bureau. In and by said stock option purchase agreement it was provided, understood and agreed that the grantee (the agency), becoming a member, purchased an option upon one or more shares of the capital stock of the Bureau at the price of One Hundred ($100.00) Dollars per share; each share covered by such option was assessable in a sum not exceeding [22] One Hundred ($100.00) Dollars in any calendar year, and it was further provided and agreed:

"During the life of this option the grantee covenants and agrees that the Bureau shall be the grantee's sole agent for the placing of outdoor advertising and shall collect and receive for its services and expenses of every nature, that percentage of commissions which may be paid on account of such advertising as is currently charged to all its other members.

"This option is personal to the grantee, and is not transferable, nor can any rights or privileges under it, or of membership in the Bureau be transferred.

"It is agreed that any breach of any of the terms hereof by the grantee or any act or conduct of the grantee which shall or may be prejudicial to the interest of the Bureau, may cause the suspension or expulsion of the grantee from membership in the bureau, and the forfeiture of all rights and privileges of membership, as well as the forfeiture and cancellation of this option, and the forfeiture of the money paid therefor."

The Bureau kept a list of all association plants, and the statistical information furnished by the association with respect to its member plants, the kind, character and amount of service that could be rendered by any plant, and kept said statistical information, which was in a constant state of flux and change, substantially down to date. This information was [23] furnished without charge by the Bureau to its members. It is impossible to conduct an agency for the securing and posting of outdoor advertising contracts successfully without this information, and the Bureau being the only method by which it could be obtained, except through paying the prohibitive price exacted by the association to non-bureau members. The practical effect of the arrangement was that agencies desiring to handle outdoor advertising were compelled to, and did, become members of the Bureau, thus making the Bureau their exclusive agent (under the stock option above quoted) for the placing of outdoor advertising contracts secured by member agencies.

XII.

Prior to 1925 there were two principal groups of companies in the United States, exclusive of the Foster & Kleiser Co., engaged in soliciting national outdoor advertising and operating large poster and paint plants. These were: (1) the so-called Thomas Cusack group, and (2) the so-called Fulton group.

The principal company in the Cusack group was the Thomas Cusack Company, incorporated in 1903 under the laws of the State of New Jersey. The

Cusack Company gradually extended its ownership of both paint and poster plants until during the period from 1918 to 1920 it and its subsidiary companies conducted soliciting offices and operated poster plants in many of the principal cities of the United States, including New York, Chicago, St. Louis, Kansas City, Omaha, Denver, New Orleans, Indianapolis, St. Joseph, Philadelphia, Buffalo, Rochester, Cleveland, Dayton, Baltimore, Washington, Hartford, Memphis, Pittsburgh, Akron, Davenport, Duluth, Nashville, Youngstown, and Jacksonville, Florida. It also operated poster plants and paint plants in about one hundred smaller cities throughout the United States. [24]

In addition to soliciting and display facilities owned and operated by the Cusack Company, or subsidiaries thereof, there was in existence a contractual arrangement between the said Cusack Company and the Bureau whereby the Cusack Company executed all of the contracts for National Outdoor Advertising Bureau obtained by members of the Bureau.

This contract contained the same, or substantially the same, provisions as the contract hereafter referred to between said Bureau and General Outdoor Advertising Company. As a result of the ownership and control of poster plants and paint plants, together with the contractual arrangement with the Bureau, between the years 1918 and down to the formation of the General Outdoor Advertising Company in 1925 (hereafter described) the Cusack

group of companies was and constituted the largest outdoor advertising business in the world.

As a part of said conspiracy and combination to monopolize, attempt to monopolize, and to monopolize through an arrangement between the said Cusack Company and defendant, Foster & Kleiser Co., and as plaintiff is informed and believes, and upon and according to such information and belief alleges, more particularly between Walter F. Foster, in his own behalf, and acting on behalf of the said Foster & Kleiser Co., and the said Cusack Company, all of the national outdoor advertising business secured through the Bureau and Bureau members, and executed by the Cusack Company under the contract aforesaid were, insofar as said contracts were to be executed upon the plants in the Pacific Coast Area, sublet to Foster & Kleiser Co., and none of said contracts, nor any part thereof, were executed on any of the plants of the independent companies, whereby the said independent companies in the Pacific Coast Area were excluded from participation in said business; competition in the business was [25] restrained, hampered and hindered, and interstate trade and commerce in posters, lithographs, paint designs and contracts for the execution and display of outdoor advertising in interstate commerce were, and each of them was, unreasonably hampered, restrained and restricted.

XIII.

The Fulton group, hereinabove referred to, consisted of the Poster Advertising Company, Inc.,

which company was exclusively a soliciting or sales company, with which were affiliated approximately twenty (20) plants, owners operating plants in the states of New York, Virginia, Connecticut, Illinois, Pennsylvania and Georgia.

Toward the end of 1924, in furtherance of said plan and conspiracy, and for the purpose of monopolizing and attempting to monopolize the business of outdoor advertising in interstate commerce, it was proposed, and negotiations were started for the purpose of merging the said Fulton group, the said Cusack group, and defendant, Foster & Kleiser Co. To that end and for that purpose General Outdoor Advertising Company, Inc., (hereafter called the "General Company") was incorporated under the laws of the State of New Jersey, in which there was merged the Cusack Companies and the Fulton Companies, including Poster Advertising Company, Inc. The ultimate arrangement did not include the merging of defendant, Foster & Kleiser Co. In lieu and in the place and stead of said defendant, Fost. & Kleiser Co., merging in said General Outdoor Advertising Company, Inc., the following arrangement was made and carried into effect, to-wit: Foster & Kleiser Investment Company, a corporation, organized under the laws of the State of California, the capital stock of which, except for one director's qualifying share, was and is wholly owned by said Foster and said Kleiser, purchased [26] certificates representing fifty thousand (50,000) shares of the common capital stock of the General Company for the sum of

One Million ($1,000,000.00) Dollars. Said George W. Kleiser was elected a director of said General Company. A community of interest between the General Company and Foster and Kleiser Company was thereby established, whereby the said Foster and Kleiser Company conducted its business operations on the Pacific Coast and the territory west of the Rocky Mountains, and the General Company conducted its business operations east of the Rocky Mountains without entering each other's territory or competing each with the other.

In furtherance of and as a part of the said plan, scheme, and conspiracy to monopolize the business of outdoor advertising in interstate commerce, and in furtherance of the monopoly thereof, the said contract between the Bureau and the Cusack Company heretofore referred to was cancelled and a new contract bearing date the 24th of August, 1925, was made and entered into betwen said Bureau and General Outdoor Advertising Company, under which contract the Bureau was constituted agent of the General Company to solicit contracts for national outdoor advertising to be executed upon the plants owned or operated by the General Company, and at the option of the Bureau to be executed upon plants not owned or operated by the General Company. Said contract further provided that all advertising contracts procured or obtained by the Bureau to be performed by the General Company should forthwith be assigned by the Bureau to the General Company. In the practical operation of this contract all of the contracts for outdoor advertising obtained by

the agencies which were members of the Bureau were assigned to the General Company, and under the plan, scheme and conspiracy heretofore referred to and the community of interests and close working relationship between Foster & Kleiser Co. and the said General Company, all of said contracts which [27] were to be executed upon the Pacific Coast or in plants in the Pacific Coast area were executed upon the plants of Foster & Kleiser Co., and none of said contracts were executed upon independent plants, and the said independent plants were excluded from competition for or participation in all of the national outdoor advertising of the United States.

From and after the completion of the formation of the General Company, said General Company had approximately one thousand (1,000) franchises or memberships in the paint association and poster association, and was the largest single holder of franchises or memberships therein. Foster and Kleiser Company had approximately six hundred (600) memberships therein and was the second largest holder of franchises or memberships therein, and after the consolidation of the two associations into Outdoor Advertising Association, Inc., in 1927, the said General Company and Foster and Kleiser Company became and were the two largest holders of memberships therein. Of the twenty-seven (27) directors of said Outdoor Advertising Association, Inc., six (6) were officers or employees of the General Company, and said Kleiser was a director and for many years president of said association. The said conspirators thereby controlled and dominated

said association and the operation and functioning thereof.

XIV.

By the domination and control of the association, the conspirators thereby controlled the method and manner in which said associations, and their successor association, collected, compiled, listed and furnished to agencies information respecting the kind and character of service offered by various plant owners, and excluded from said service all information respecting independent plants;

Through said associations and association and also through [28] the Poster Advertising Company, said conspirators controlled the solicitors licensed by the association and thereby prevented such solicitors from placing business on independent plants. By refusing to post advertising unless received through a solicitor (except such as came from or through the Bureau), advertisers were thereby compelled to place their advertising on association plants or not advertise at all. By charging an excessive and prohibitive price for said statistical service to non-bureau members, and by paying a commission of sixteen and two-thirds (16⅔%) per cent. to Bureau members and a commission of ten (10%) per cent. to non-bureau members, said conspirators compelled advertising agencies to be and become members of the Bureau. Through said stock option purchase agreement, said Bureau members were compelled to and did make said Bureau the sole agent for the placing of said business,

through said agreement with the Cusack Company, and later with the General Company, said Bureau placed all of said business with said companies and through the community of interests established as aforesaid between the General Company and Foster & Kleiser Co., all of said business in the Pacific Coast Area was placed for execution upon the plants of Foster & Kleiser Co. to the exclusion of all independent plants, including the plant of plaintiff, and interstate commerce in outdoor advertising, posters, paint designs, stencils and contracts for outdoor advertising was thereby monopolized, restricted, curtailed and unreasonably restrained.

Plaintiff is informed and believes, and upon and according to such information and belief, alleges that as a result of the things and matters in this complaint set forth, said Foster & Kleiser Co. for several years last past has controlled, and does now control, over ninety (90%) per cent of the outdoor advertising business in said Pacific Coast area. [29]

XV.

That the defendants, in furtherance and as a part of said plan, scheme and conspiracy mentioned heretofore and particularly in paragraph VII, VIII, XII and XIII hereof, from the year 1920 and during all the times herein mentioned, the precise dates of which are unknown to plaintiff company, but known to defendants, have monopolized and attempted to monopolize, and now are monopolizing the said trade and interstate commerce in outdoor advertising in the manner and by the means herein

alleged, and have been engaged in a conspiracy and combination to place unlawful restraints upon the trade and commerce in posters and lithographs between the several states of the United States, in violation of the provisions of the Act of Congress approved July 2nd, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Anti-Trust Act, and in furtherance of said conspiracy and combination, did place unlawful restraints upon the trade and commerce in posters and lithographs and painted display advertising between the several states of the United States, by the commission of various and sundry acts, specific instances of which are as follows, to-wit:

That defendants formulated, adopted and practiced the policy of interfering with all competitors of any of the defendants, and particularly the defendant Foster & Kleiser Co., for the purpose of preventing said competitors from carrying on their lawful business and the aforesaid interstate trade and commerce in outdoor advertising in competition with the defendants, and particularly in competition with the defendant Foster & Kleiser Co. That the defendants offered to pay, and in fact did pay for outdoor advertising sites, amounts greatly in excess of their true worth and value, and did thereby prevent plaintiff and other [30] competitors in and among the Pacific Coast States from procuring said advertising sites at a reasonable price. That defendants offered to purchase and

lease outdoor advertising sites for amounts greatly in excess of their true worth and value. That said offers were made under fictitious names, without any intent on the part of the defendants to consummate the same and with intent, solely, of preventing plaintiff company and other competitors from procuring said advertising sites at a reasonable price. That defendants attempted to cause and did cause the cancellation of leases held by plaintiff company and other competitors by causing the lessors thereof to demand possession of said sites for other than advertising purposes. That defendants did make fictitious offers to lessors of advertising sites to plaintiff company and other competitors of the defendants for the leasing of such sites for purposes other than advertising, with no intent to actually lease said sites, but only for the purpose of preventing plaintiff company and other competitors of defendants from using said sites for advertising purposes. That defendants attempted to lease and actually did lease more outdoor advertising sites than were reasonably required for the proper conduct of the outdoor advertising business of defendants, and particularly of the defendant Foster & Kleiser Co., and without any intent to use said sites for the purpose of outdoor advertising, but merely for the purpose of preventing and excluding the use thereof for outdoor advertising by the plaintiff company or other competitors of the defendants.

That defendants attempted to lease and actually did lease outdoor advertising sites without using the same or intending to use the same for any purpose

reasonably necessary or incidental to the proper conduct of the outdoor advertising business, but solely for the purpose of preventing and excluding the plaintiff [31] company and other competitors from the use thereof for outdoor advertising purposes, and from carrying on their respective businesses in competition with defendants. That defendants attempted to lease and actually did lease outdoor advertising sites from lessors on the understanding that the same would not be used for outdoor advertising purposes solely with intent to prevent and exclude plaintiff company or any other competitors leasing said sites for outdoor advertising purposes. That defendants employed a system of espionage and continuously solicited, obtained, procured and reported detailed information regarding outdoor advertising sites leased or contemplated by the plaintiff company and other competitors to be leased for outdoor advertising purposes in order that defendants could defeat the efforts of plaintiff company and other competitors in procuring said leases and in devoting the same advantageously to the business of outdoor advertising, and did actually utilize and make use of said information for the sole purpose of preventing and excluding the plaintiff company and other competitors of the defendants from transacting their respective businesses in competition with defendants. That defendants employed a contact system whereby defendants continuously contacted lessors of property under lease to plaintiff company in an endeavor to have lessors breach plaintiff company's leases and thereby elimi-

nate plaintiff company as competitor of the defendants.

That defendants did physically obstruct, conceal, cover, obliterate, destroy and otherwise impair the visibility and display advantages of outdoor advertising structures owned, operated and/or controlled by the plaintiff company and other competitors of the defendants; that the defendants employed agents and lobbyists for the purpose of obtaining information and cooperation from city and county officials of cities and counties [32] situated in and among the several states of the Pacific Coast Area regarding outdoor advertising sites owned or leased, or intended to be owned or leased by the plaintiff company and other competitors of the defendants, and utilizing and making use of the said information or cooperation solely for the purpose of preventing and excluding the plaintiff company and other competitors from procuring or retaining advantageous advertising sites leased or contemplated to be leased for outdoor advertising purposes and did employ such agents and lobbyists for the purpose of procuring for the defendants, particularly for the defendant Foster & Kleiser Co., advantages and concessions over the plaintiff company and other competitors in the leasing and maintaining of outdoor advertising sites.

That, in each and every instance heretofore referred to in this paragraph XV, where, solely with intent to monopolize the outdoor advertising business by preventing the plaintiff company from soliciting, securing and executing outdoor advertising

contracts which were entered into or would have been entered into for the primary purpose of moving advertising posters, lithographs, designs, stencils and/or other advertising materials in interstate commerce to and including the posting of the posters or lithographs and/or painting from the designs, stencils and other advertising materials upon a stated number and class of billboards or paint panels and, in many cases, upon certain specified billboards or paint panels owned or within the control of the plaintiff company, the defendants interfered with the plaintiff company's business by paying exorbitant sums for lease or purchase of outdoor advertising sites or structures, caused the cancellation of plaintiff company's leases of outdoor advertising sites or structures, prevented plaintiff company from leasing outdoor advertising sites or structures by making fictitious [33] offers therefor for other than advertising purposes, leased more outdoor advertising sites or structures than necessary for the proper conduct of its business, and/or physically obstructed, concealed, covered, obliterated, destroyed and otherwise impaired the visibility and display advantages of outdoor advertising structures owned, operated and controlled by the plaintiff company and other competitors of the said defendants, the instant, direct and continued effect constituted and was a substantial restraint upon and interference with the plaintiff company's outdoor advertising business in its interstate aspects by rendering the legitimate performance of existing contracts and the continuation thereof by the pro-

curation of new contracts partially or wholly impossible and tended immediately to further the aforementioned plan, scheme and conspiracy to attempt to monopolize and to monopolize the outdoor advertising business throughout the Pacific Coast Area.

XVI.

Plaintiff company further alleges that during the month of January, 1932, C. E. Stevens, President of the plaintiff company, established a business office at San Francisco, California, for the purpose of expanding plaintiff company's outdoor advertising business into the city and county of San Francisco, in order that it would be able to serve its customers with an outdoor advertising display service in the State of California in conjunction with the service it already offered; that as soon as C. E. Stevens established himself and became engaged in attempting to lease outdoor advertising sites, defendants, particularly Foster & Kleiser Co., learned of plaintiff company's plans, and in furtherance and as part of said plan, scheme and conspiracy mentioned in paragraphs VII, VIII, XII and XIII hereof, immediately set in motion a scheme and concerted effort to restrain and [34] prevent plaintiff company from obtaining any advantageous outdoor advertising locations and thereby prevented and restrained the plaintiff from establishing an outdoor advertising plant in the city and county of San Francisco, California; that defendants, particularly Foster & Kleiser Co., on learning of plaintiff com-

pany's plans to establish an outdoor advertising plant at San Francisco, immediately instructed their employees to lease every available outdoor advertising site in and about the city of San Francisco in order that it would be impossible for the plaintiff company to obtain any locations and thereby prevent plaintiff company from establishing an advertising plant in competition with defendant Foster & Kleiser Co., solely with intent to monopolize the outdoor advertising business by preventing the plaintiff company from soliciting, securing and executing outdoor advertising contracts which were entered into or would have been entered into for the primary purpose of moving advertising posters, lithographs, designs, stencils and/or other advertising materials in interstate commerce to and including the posting of the posters or lithographs and/or the painting from the designs, stencils and other advertising materials upon billboards or paint panels owned by or within the control of the plaintiff company; that plaintiff company was put to great expense and loss of time in attempting to establish an outdoor advertising business, as the same has been heretofore defined and explained, in San Francisco and has lost the profits and will continue to lose profits from many advertising accounts by reason of said unlawful acts; that due to the unfair and unlawful practices of defendants, plaintiff company has been restrained and prevented from establishing a business in San Francisco, all to the great injury and damage to plain-

tiff company herein; that plaintiff company at all times intended and was prepared to establish an outdoor advertising business in the [35] City of San Francisco, California, and would have and could have established said outdoor advertising business and engaged in interstate commerce therein, as aforesaid, but for the unlawful restraints and restrictions placed upon plaintiff company by defendants.

XVII.

That the aforesaid acts, on the part of the defendant company and the other defendants herein named, were in unreasonable restraint of trade and commerce among the several states and did constitute a monopoly and were and are an attempt to monopolize the said trade and commerce, and did create a monopoly thereof greatly to the damage of the plaintiff company, and that the plaintiff company was unreasonably restrained in its trade and competition with defendant in the outdoor advertising business, as heretofore defined and explained, all of which was injurious to the plaintiff company and excluded the plaintiff company from fair competition in the said trade and commerce, and because of such inability to compete in the said trade and commerce during the periods mentioned, to and including the date of the commencement of this action, the plaintiff company has been damaged in that its business was rendered unprofitable, and the profits of its said trade and commerce have diminished, and the plaintiff company has suffered loss and been

damaged thereby, from said year 1924 to the time of filing the complaint, and furthermore, as set forth more particularly in paragraph XV hereof, the plaintiff company has suffered great loss of profits and moneys invested and damage by reason of its inability to engage in said trade and commerce in the City of San Francisco and the State of California, all in the sum of Three Hundred and Fifty Thousand Dollars ($350,000.00).

Wherefore, plaintiff, C. E. Stevens Company, demands judg- [36] ment against defendants for the sum of Three Hundred and Fifty Thousand Dollars ($350,000.00), and treble damages, together with reasonable counsel fees, besides the costs and disbursements of this action.

SECOND COUNT

I.

That plaintiff C. E. Stevens Tacoma Company is now, and ever since about June 1, 1928, and at all times herein mentioned, has been a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Washington having its principal place of business located at Tacoma, Pierce County, State of Washington. That ever since June 1, 1928, plaintiff has been engaged in the business of outdoor advertising in the said State of Washington and other states of the United States, and has been at all times engaged in

interstate commerce between the various states of the United States, as will more fully appear hereinafter.

II.

For the sake of brevity of pleading the plaintiff company refers and by this reference repeats all of the allegations contained in Paragraphs II to XV, inclusive, of the First Count, hereof, and re-affirms, realleges and adopts each and every such allegation as an allegation of the cause of action of this plaintiff company, C. E. Stevens Tacoma Company.

III.

That the aforesaid acts, on the part of the defendant company and other defendants herein named, were in unreasonable restraint of trade and commerce among the several states and did constitute a monopoly and were and are an attempt to monopolize the said trade and commerce, and did create a monopoly thereof greatly to the damage of the plaintiff company, and that the [37] plaintiff company was unreasonably restrained in its said trade and competition with defendants in the outdoor advertising business, as heretofore defined and explained, all of which was injurious to the plaintiff company and excluded the plaintiff company from fair competition in the said trade and commerce, and because of such inability to compete in the said trade and commerce during the periods mentioned to and including the date of the commencement of

this action, the plaintiff company has been damaged in that its business was rendered unprofitable, and the profits of the said trade and commerce have diminished and the plaintiff company has suffered loss and been damaged thereby, from said June 1, 1928, to the time of filing the complaint herein, in the sum of Fifty Thousand Dollars ($50,000.00).

Wherefore, the plaintiff, C. E. Stevens Tacoma Company, demands judgment against the defendant and prays for treble damages herein, together with reasonable counsel fees, besides the costs and disbursements of this action.

THIRD COUNT

I.

That C. E. Stevens Company of Oregon is now, and ever since about June 1, 1928, and at all times herein mentioned has been a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, having its principal place of business located at Portland, Multnomah County, State of Oregon; that ever since June 1, 1928, plaintiff company has been engaged in outdoor advertising in said State of Oregon and other states of the United States, and has been at all times engaged in interstate commerce between the various states of the United States, as will more fully appear hereinafter.

II.

For the sake of brevity of pleading the plaintiff company refers and by this reference [38] repeats

all the allegations contained in Paragraphs II to XV, inclusive, of the First Count hereof, and reaffirms, realleges and adopts each and every such allegation as an allegation of the cause of action of this plantiff company, C. E. Stevens Company of Oregon.

III.

That the aforesaid acts, on the part of the defendant company and other defendants herein named, were in unreasonable restraint of trade and commerce among the several states and did constitute a monopoly and were and are an attempt to monopolize the said trade and commerce, and did create a monopoly thereof greatly to the damage of the plaintiff company, and that the plaintiff company was unreasonably restrained in its said trade and competition with defendants in the outdoor advertising business, as heretofore defined and explained, all of which was injurious to the plaintiff company and excluded the plaintiff company from fair competition in the said trade and commerce, and because of such inability to compete in the said trade and commerce during the periods mentioned to and including the date of the commencement of this action, the plaintiff company has been damaged in that its business was rendered unprofitable, and the profits of the said trade and commerce have diminished and the plaintiff company has suffered loss and been damaged thereby, from said June 1, 1928, to the time of the filing of the complaint herein, in the sum of One Hundred Thousand Dollars ($100,000).

Wherefore, the plaintiff, C. E. Stevens Company of Oregon, demands judgment against the defendants and prays for treble damages herein, together with reasonable counsel fees, besides the costs and disbursements of this action.

ROY E. JACKSON
WRIGHT, JONES & BRONSON
Attorneys for Plaintiffs. [39]

State of Washington,
County of King—ss.

C. E. Stevens, being first duly sworn on oath on behalf of the plaintiff corporations in the above-entitled action, says: That at the time of the filing of the original complaint herein he was the president of each of said corporations; that at present he is president of the C. E. Stevens Company of Oregon; that he has read the foregoing Second Amended Complaint, knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters, that he believes them to be true.

C. E. STEVENS

Subscribed and sworn to before me this 28th day of March, 1938.

[Seal] A. P. BOWES,
Notary Public in and for the State of Washington, residing at Seattle.

Copy received this 30th day of Mar., 1938.
KERR, McCORD & CAREY
By C. A.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division Mar. 30, 1938. Edgar M. Lakin, Clerk, By Elmo Bell, Deputy. [40]

[Title of District Court and Cause.]

DEMURRER TO SECOND AMENDED COMPLAINT

Comes now each of the defendants Foster and Kleiser Company, a corporation, Gerald O'Neil and Restop Realty Company, a corporation, separately, the said Foster and Kleiser Company and Gerald O'Neil by their attorneys, Morrison, Hohfeld, Foerster, Shuman & Clark and Herbert W. Clark, and the said Restop Realty Company by its attorneys, Kerr, McCord & Carey and Stephen V. Carey, and severally, each on its or his behalf, and not one for the other nor jointly, demurs to the second amended complaint of the plaintiffs and to the First Count thereof, purporting to set forth a cause of action in favor of C. E. Stevens Company, as follows, to-wit:

I.

That the court has no jurisdiction of the persons of the defendants, or any of them, or of the subject matter of the action in that: [41]

(a) No cause of action is stated therein by the plaintiff C. E. Stevens Company against the defendants, or either or any of them, within the provisions of the Act of Congress approved July 2, 1890, and entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies;"

(b) That said First Count does not set forth a substantial claim presenting a cause within the jurisdiction of this court as a Federal Court; and

(c) It appears upon the face of said First Count that a complete diversity of citizenship does not exist between the plaintiffs and the defendants and the said asserted First Count does not state facts to show any other ground upon which this court has jurisdiction of the subject matter of the action.

II.

That several causes of action are improperly united in that it appears upon the face of said second amended complaint that C. E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, are joined as plaintiffs, although the alleged right or rights of each of said plaintiffs are not joint with the alleged right or rights of both or either of the other plaintiffs but that such alleged right or rights of each plaintiff, if any, are separate, distinct and unconnected.

III.

That the said First Count does not state facts sufficient to constitute a cause of action against the defendants, or any or either of them.

IV.

That it appears upon the face of the said First Count that the cause of action attempted to be stated therein has not been commenced within the time limited by law and that said cause of action, if any such cause of action has heretofore existed, is now barred under and by reason of the provisions of Section 165 of [42] Remington's Revised Statutes of Washington or by subdivision (2) of Section 159 of Remington's Revised Statutes of Washington.

DEMURRER TO SECOND COUNT

To the Second Count of said second amended complaint, purporting to set forth a cause of action in favor of C. E. Stevens Tacoma Company, the said defendants severally, each on its or his behalf, and not one for the other nor jointly, demurs upon the same grounds heretofore stated in respect of the said First Count.

DEMURRER TO THIRD COUNT

To the Third Count of said second amended complaint, purporting to set forth a cause of action in favor of C. E. Stevens Company of Oregon, the said defendants severally, each on its or his behalf,

and not one for the other nor jointly, demurs upon the same grounds heretofore stated in respect of the said First Count.

We hereby certify that the foregoing demurrer to the second amended complaint is not filed for purposes of delay and that same in our opinion is well taken in point of law.

Dated July 8, 1938.

MORRISON, HOHFELD,
FOERSTER, SHUMAN &
CLARK,
HERBERT W. CLARK,
Attorneys for Foster and Kleiser
Company and Gerald O'Neil.

KERR, McCORD & CAREY,
STEPHEN V. CAREY,
Attorneys for Restop Realty Company.

Service by receipt of copies hereof admitted this 11th day of July, 1938.

ROY E. JACKSON,
WRIGHT, JONES & BONSON.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1938, Edgar M. Lakin, Clerk. By Elmo Bell, Deputy. [43]

COURT'S RULING SUSTAINING DEFENDANT'S DEMURRER TO SECOND AMENDED COMPLAINT.

United States District Court
Western District of Washington
Seattle, Washington

Chambers of John C. Bowen, District Judge

April 26, 1939.

Jones & Bronson and Roy E. Jackson,
610 Colman Building,
Seattle, Washington.

Attorneys for Plaintiffs.

Kerr, McCord & Carey and
Morrison, Hohfeld, Foerster, Shuman & Clark,
1309 Hoge Building,
Seattle, Washington,

Attorneys for Defendants.

Re: Stevens Co. v. Foster & Kleiser Co., No. 20755.

Dear Sirs:

I am of the opinion that the Second Amended Complaint stripped of pleader argument and conclusion does not sufficiently state facts or factual basis for the alleged direct interstate interference by any of the defendants with plaintiffs' outdoor advertising business, and that no sufficient cause of action is stated under the Sherman Anti-Trust Act. Foster & Kleiser Co. v. Special Site Sign Co., 85 F.

(2d) 742 (cer. den. 299 U. S. 613); Ebeling v. Foster & Kleiser Co., 12 F. Supp. 489; and Shurtz v. Foster & Kleiser, et al., D. C., N. Dist. of Cal., No. Law 19795-S, Decision by St. Sure, D. J., filed Feb. 2, 1939.

This case having on both sides and for a long time had the active attention of eminent counsel who have been advised of the progress and outcome of the similar cases herein and in the briefs cited, and plaintiffs' complaint having been amended twice already, the demurrer to the second amended complaint will be as to all defendants sustained without leave to amend.

An order carrying the foregoing into effect may be settled upon notice or stipulation.

Yours respectfully,

JOHN C. BOWEN,

U. S. Dist. Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Apr. 26, 1939, Elmer Dover, Clerk. By Elmo Bell, Deputy. [44]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20755.

C. E. STEVENS COMPANY, a Corporation, C. E. STEVENS TACOMA COMPANY, a Corporation, and C. E. STEVENS COMPANY OF OREGON, a Corporation,

Plaintiffs,

v.

FOSTER & KLEISER CO., a Corporation, GEORGE W. KLEISER, WALTER P. FOSTER, AUGUST F. LAUSEN, Jr., ALBERT MORTENSON, GILMAN HAYNES, RESTOP REALTY CO., a Corporation, GERALD O'NEIL, LYLE ABRAHAMSON, PAUL DUEBER, WALTER STEVENS and GEORGE SMITH,

Defendants.

JUDGMENT.

This cause heretofore came on regularly for hearing on the separate demurrers of the defendants Foster and Kleiser Company, a corporation, Gerald O'Neil, Restop Realty Co., a corporation, and George W. Kleiser (the defendant George W. Kleiser having by stipulation of counsel and approval of the Court demurred separately by adopting the grounds of demurrer stated in the separate demurrers on file herein of the other defendants) to the second amended complaint of the plaintiffs, C.

E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, the several parties plaintiff and defendant appearing by their respective attorneys of record, and was submitted to the Court on written briefs and arguments; and the Court having considered the same and having, on April 26, 1939, filed its opinion holding that said second amended complaint as this day amended by interlineation is insufficient to state any cause of action in favor of either or any of said plaintiffs against [45] all or any of the defendants, and that said demurrers should be sustained without leave to amend; and it appearing to the Court that none of the parties named in the title of this cause as defendants other than said Foster and Kleiser Company, a corporation, Gerald O'Neil, Restop Realty Co., a corporation, and George W. Kleiser have been served with process, nor have they, or either of them, appeared herein, Now, Therefore,

It Is Ordered, Adjudged and Decreed that said demurrers, and each of them, be and they are each hereby sustained without leave to amend; that said plaintiffs, and each of them, take nothing by the above entitled action; that said action be and it is hereby dismissed; and that said defendants, and each of them, have and recover their costs of suit herein to be taxed by the clerk as provided by Rule 54.

Let this judgment be entered.

Done in Open Court this 8th day of June, 1939.

JOHN C. BOWEN,
United States District Judge.

Presented by:
STEPHEN V. CAREY,
One of Defendants' Attorneys.

Approved as to form:
H. R. JONES,
One of Attorneys for Plaintiffs.

In open Court at the time of the entry of the foregoing judgment the plaintiffs objected thereto, claiming their second amended complaint as this day amended by interlineation to be sufficient to state a cause of action, and said objection and exception is now noted and allowed.

Done in Open Court this 8th day of June, 1939.

JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 8, 1939, Elmer Dover, Clerk. By S. Cook, Deputy. [46]

[Title of District Court and Cause.]

NOTICE OF APEAL TO CIRCUIT COURT OF APPEALS.

Notice Is Hereby Given that C. E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, plaintiffs above-named,

hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on June 8, 1939.

ROY E. JACKSON,
JONES & BRONSON,
H. B. JONES,
ROBERT BRONSON,
Attorneys for appellants, C. E. Stevens Company, C. E. Stevens Tacoma Company, and C. E. Stevens Company of Oregon.

Address:
610 Colman Building,
Seattle, Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 16, 1939, Elmer Dover, Clerk. By S. Cook, Deputy. [47]

[Title of District Court and Cause.]

COST BOND ON APPEAL.

Know All Men by These Presents:

That the Undersigned, C. E. Stevens Company, a Corporation, et al. in the above entitled action, as Principals, and Occidental Indemnity Company, a corporation organized under the laws of the State of California, and authorized to transact the business of Surety in the State of Washington, as Surety, are held and firmly bound unto the above entitled Foster & Kleiser Co., a Corporation, et al, in the penal sum of Two Hundred Fifty ($250.00)

Dollars, lawful money of the United States for the payment of which well and truly to be made, the said Principals and the said Surety bind themselves, their heirs and personal representatives or successors jointly and severally firmly by these presents.

Dated and sealed this 16th day of June, 1939.

Whereas, on the 8th day of June, 1939, the above entitled Court rendered and entered a judgment or decree in the above entitled cause in favor of the above named obligees and against the above named principals;

And Whereas, the said appellants feeling aggrieved by said judgment or decree and desiring to appeal from the same to the U. S. Circuit Court of Appeals for the Ninth Circuit; and perfect said appeal by this bond.

Now, Therefore, the condition of the above obligation is such, that if the said appellants will pay all costs and damages that may be awarded against them on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty ($250.00) Dollars, then this obligation shall be void, otherwise to remain in full force and virtue.

C. E. STEVENS COMPANY, et al.

By (Signed) JONES & BRONSON,

Attorneys for C. E. Stevens Company et al.

Attest:

OCCIDENTAL INDEMNITY COMPANY

By J. E. CHARBONNEL,

Attorney in Fact.

[Seal]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 16, 1939, Elmer Dover, Clerk. By S. Cook, Deputy. [48]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL.

Come now C. E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, plaintiffs above-named, and file this statement of points on which they intend to rely on their appeal from a certain final judgment of this Court, in the above-entitled cause, made and entered on June 8, 1939, to-wit:

1. That as a matter of law the facts stated by the Second Amended Complaint in the above-entitled cause sufficiently set forth a cause of action under the provisions of the Act of Congress approved July 2, 1890, and entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

2. That as a matter of law the Second Amended Complaint in the above-entitled cause sufficiently states facts or factual basis for the alleged direct interstate interference by the defendants with plaintiffs' out- [49] door advertising business.

3. That, within the meaning of Rule 15 (a) of the Federal Rules of Civil Procedure, justice requires that leave be given to the plaintiffs in the above-entitled cause to amend their Second Amended Complaint, even though it be held that the said complaint is insufficient to state a cause of action under the provisions of the Act of Congress approved July 2, 1890, and entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

ROY E. JACKSON,
JONES & BRONSON,
H. B. JONES,
ROBERT BRONSON,
Attorneys for appellants, C. E. Stevens Company, C. E. Stevens Tacoma Company, and C. E. Stevens Company of Oregon.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 16, 1939, Elmer Dover, Clerk. By S. Cook, Deputy. [50]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

To the Clerk:

You are requested to take a transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an appeal in the above-entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

1. Second Amended Complaint.
2. Demurrer to Second Amended Complaint.
3. Letter: John C. Bowen, U. S. District Judge, to counsel, embodying Memorandum Opinion, dated April 26, 1939.
4. Judgment, dated June 8, 1939.

Respectfully,
ROY E. JACKSON,
JONES & BRONSON,
H. B. JONES,
ROBERT BRONSON,
Attorneys for appellants, C. E. Stevens Company, C. E. Stevens Tacoma Company, and C. E. Stevens Company of Oregon.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 16, 1939, Elmer Dover, Clerk. By S. Cook, Deputy. [51]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, Elmer Dover, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 51 both inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by designation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the said District Court at Seattle, and that the same constitute the record on appeal herein from the Judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Appeal fee (Sec. 5 of Act)	$ 5.00
Clerk's fees (Act Feb. 11, 1925) for comparing record—166 folios at .05c	8.30
Certificate of Clerk to Transcript of Record	.50
Total	$13.80

I hereby certify that the above cost for preparing and certifying record, amounting to $13.80 has been paid to me by the attorneys for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 19th day of June, 1939.

[Seal] ELMER DOVER,
Clerk, United States District Court for the Western District of Washington.
By ELMO BELL, Deputy.

[Endorsed]: No. 9215. United States Circuit Court of Appeals for the Ninth Circuit. C. E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, Appellants, vs. Foster & Kleiser Co., a corporation, George W. Kleiser, Walter P. Foster, August F. Lausen, Jr., Albert Mortenson, Gilman Haynes, Restop Realty Co., a corporation, Gerald O'Neil, Lyle Albrahamson, Paul Dueber, Walter Stevens and George Smith, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed June 23, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9215.

C. E. STEVENS COMPANY, a Corporation, et al,
Appellants,

v.

FOSTER & KLEISER CO., a Corporation, et al,
Appellees.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

To the Clerk:

As and for the record on appeal herein, you are requested to print the entire transcript of record in the above-entitled appeal as certified to you by the Clerk of the District Court of the United States, for the Western District of Washington, Northern Division.

Respectfully,
ROY E. JACKSON,
JONES & BRONSON,
H. B. JONES,
R. E. BRONSON,
Attorneys for appellants, C. E. Stevens Company, C. E. Stevens Tacoma Company, and C. E. Stevens Company of Oregon.

Copy Received this 29th day of June, 1939.
KERR, McCORD & CAREY.
By C. A.

[Endorsed]: Filed June 29, 1939, Paul P. O'Brien, Clerk.

No. 9215

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

C. E. STEVENS COMPANY, a corporation, C. E. STEVENS TACOMA COMPANY, a corporation, and C. E. STEVENS COMPANY OF OREGON, a corporation,

Appellants,

vs.

FOSTER & KLEISER CO., a corporation, GEORGE W. KLEISER, WALTER P. FOSTER, AUGUST F. LAUSEN, JR., ALBERT MORTENSON, GILMAN HAYNES, RESTOP REALTY CO., a corporation, GERALD O'NEIL, LYLE ALBRAHAMSON, PAUL DUEBER, WALTER STEVENS AND GEORGE SMITH,

Appellees.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 543 SANSOME STREET, SAN FRANCISCO.

[Title of Circuit Court of Appeals and Cause.]

MOTION OF APPELLEES FOR CORRECTION OF RECORD ON SUGGESTION OF OMISSION OF MATTER MATERIAL TO APPELLEES.

Come now appellees Foster and Kleiser Company, a corporation, George W. Kleiser, Restop Realty Company, a corporation, and Gerald O'Neil, and suggest the omission in the record of the above entitled action of matter material to appellees, as follows:

(1) The transcript of record now on file in this court omits matter material to these appellees, in that appellants' motion filed in the District Court of the United States for the Western District of Washington, Northern Division, on June 8, 1939 praying for leave to amend their second amended complaint and the order of said court dated June 8, 1939 allowing the requested amendment, were omitted therefrom.

(2) The aforesaid omitted matter is material to these appellees for the reasons that:

(a) Appellants in Point 3 of their statement of points on appeal (Tr. p. 62) and at pages 69-71, inclusive, of their brief on appeal claim that said court below erred in denying them further leave to amend their second amended complaint;

(b) The transcript of record on appeal now before this court contains appellants' second amended complaint (Tr. pp. 2-50, inclusive) as amended by said order of said court below dated June 8, 1939;

(c) Said amendment appears in the transcript now before this court at pages 19 and 20 of said transcript;

(d) It nowhere appears in said transcript that said amendment to appellants' second amended complaint was allowed pursuant to appellants' said motion and said order of said court below dated June 8, 1939, and as the record now stands it would appear to this court that appellants were denied leave to amend their second amended complaint, whereas the fact is, as fully appears in said omitted matter, that said appellants moved said court below for further leave to amend their second amended complaint, and said motion was granted by said court below by its said order dated June 8, 1939;

(e) Appellants are able to present to this court their second amended complaint as amended pursuant to said order of the court below dated June 8, 1939, and nevertheless claim that the record now before this court shows that they were not given said opportunity to amend their second amended complaint by said court below.

(3) Said omitted matter has been omitted from said record on appeal by error and by accident, in that:

(a) The designation of contents of record on appeal which was filed in said court below on June 16, 1939 was served upon the office of Kerr, McCord & Carey and Stephen V. Carey, Esqs., attorneys for appellee Restop Realty Company, in Seattle, Washington, on June 16, 1939, while said Stephen V. Carey, Esq., was absent from his office and in Wenatchee, Washington, on another case from which he did not return until June 22, 1939; in his absence no one else in his office was sufficiently acquainted with said case to note the omission of said material matter; since said Stephen V. Carey, Esq., upon his return to said office, assumed that the matter was in the care of the attorneys for the principal appellees in San Francisco, California, he did not examine said designation of contents of record on appeal with a view to determining whether material matter had been omitted therefrom until the time had expired, pursuant to Rule 75(a) of Rules of Civil Procedure for the District Courts of the United States, for appellees to serve and file a designation of additional portions of the record;

(b) Herbert W. Clark, Esq., one of the attorneys for these appellees who was and is in charge of the above entitled action, was absent

from his office and from California throughout the month of June, 1939, on other business; J. Hart Clinton, Esq., who is associated with said Herbert W. Clark, Esq., and with Morrison, Hohfeld, Foerster, Shuman & Clark, was in charge of the above entitled action in the absence of said Herbert W. Clark, Esq.; a copy of said designation of contents of record on appeal was not received by the office of said Herbert W. Clark, Esq., or by said J. Hart Clinton, Esq., until June 24, 1939, at which time said J. Hart Clinton, Esq., was also absent from said office; and said designation of contents of record on appeal, due to an oversight on the part of the docket clerk of said office, was not brought to the attention of said J. Hart Clinton, Esq., until after the expiration of the time permitted by said Rule 75 (a) for the service and filing of a designation of additional portions of the record.

(4) Said omitted portions of said transcript of record have been prepared and certified by the clerk of the District Court of the United States for the Western District of Washington, Northern Division; said certified copy of said omitted portions are herewith respectfully tendered; and a printed copy of said omitted portions is set forth as Appendix A to the annexed brief of appellees. There is also annexed to this motion the affidavit of J. Hart Clinton, Esq., in support thereof.

Dated, San Francisco, California, August 25, 1939.

MORRISON, HOHFELD,
FOERSTER, SHUMAN &
CLARK,
HERBERT W. CLARK,
KERR, McCORD & CAREY,
STEPHEN V. CAREY,

Attorneys for Appellees, Foster and Kleiser Company (a corporation), George W. Kleiser, Restop Realty Company and Gerald O'Neil.

J. HART CLINTON,
Of Counsel.

AFFIDAVIT IN SUPPORT OF MOTION FOR CORRECTION OF RECORD.

United States of America,
State of California,
City and County of San Francisco—ss.

J. Hart Clinton, being first duly sworn, deposes and says:

He is, and at all times herein mentioned was, an attorney at law associated with Morrison, Hohfeld, Foerster, Shuman & Clark and Herbert W. Clark, Esq., San Francisco, California, attorneys for Foster and Kleiser Company, a corporation, George W. Kleiser and Gerald O'Neil, appellees in the above appeal, and on behalf of said appellees was

in charge of supervising the preparation of the transcript of record on appeal therein during the absence of Herbert W. Clark, Esq., who was absent from his office, and from the State of California, on other business throughout the entire month of June, 1939.

By accident and error there have been omitted from said transcript of record the motion of appellants filed in the District Court of the United States for the Western District of Washingon, Northern Division, on June 8, 1939 praying for leave to amend their second amended complaint, and the order of said court dated June 8, 1939 allowing the requested amendment, in that:

(1) The designation of contents of record on appeal (Tr. p. 63) does not call for the inclusion of said motion and said order; and appellees failed to serve and file a designation of additional portions of the record within ten (10) days after the service and filing of said designation of contents of record on appeal, as permitted by Rule 75(a) of the Rules of Civil Procedure for the District Courts of the United States, for the reasons hereinafter stated:

(2) A copy of the designation of contents of record on appeal in the above entitled action was not received by the office of said Morrison, Hohfeld, Foerster, Shuman & Clark and Herbert W. Clark, Esq., until June 24, 1939, although said designation of contents of record on appeal was served upon the office of Kerr,

McCord & Carey and Stephen V. Carey, Esq., in Seattle, Washington, on June 16, 1939, and was filed in said court below on the same day.

(3) At the time said copy of said designation of contents of record on appeal was received by said office of said Herbert W. Clark, Esq., affiant was absent from said office and was in Los Angeles, California, on other business;

(4) Receipt of a copy of said designation of contents of record on appeal was, through error and oversight on the part of the docket clerk of said office, not called to the attention of affiant until the time had expired under said Rule 75(a) for appellees to serve and file a designation of additional portions of the record on appeal;

(5) Affiant is informed by Stephen V. Carey, Esq., one of the attorneys for appellee Restop Realty Company, a corporation, and believes, and upon such information and belief states, that said Stephen V. Carey, Esq., is the only person in his office sufficiently familiar with said action to have noticed the omission of said matter and that said Stephen V. Carey, Esq., was absent from his office and was at Wenatchee, Washington, on other business from on or about June 8, 1939 until on or about June 22, 1939, and that upon his return to said office he assumed that the supervision of said transcript of record on appeal was being taken care of on behalf of all the appellees

either by said Herbert W. Clark, Esq., or this affiant, and that the materiality of the omitted matter was first called to the attention of said Sephen V. Carey, Esq., by affiant long after the time had expired for appellees to file a designation of additional portions of the record pursuant to said Rule 75(a).

Copies of said motion for leave to amend and said order granting the same have been prepared and certified by the clerk of the District Court of the United States for the Western District of Washington, Northern Division. A copy of this affidavit and of the motion and notice of motion to correct the transcript of record will be served by mail upon the attorneys for the appellants in the above entitled appeal.

J. HART CLINTON.

Subscribed and sworn to before me this 25th day of August, 1939.

[Seal] W. W. HEALEY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Motion of Appellees for Correction of Record, etc., and Affidavit in Support of Motion. Filed: August 25, 1939, Paul P. O'Brien, Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 20755

C. E. STEVENS COMPANY, a corporation; C. E. STEVENS TACOMA COMPANY, a corporation,, and C. E. STEVENS COMPANY OF OREGON, a corporation,

Plaintiffs,

vs.

FOSTER & KLEISER CO., a corporation; GEORGE W. KLEISER; WALTER P. FOSTER; AUGUST F. LAUSEN, JR.; ALBERT MORTENSON; GILMAN HAYNES; RESTOP REALTY CO., a corporation; GERALD O'NEIL; LYLE ABRAHAMSON; PAUL DUEBER; WALTER STEVENS and GEORGE SMITH,

Defendants.

MOTION TO AMEND SECOND AMENDED COMPLAINT.

Come now the plaintiffs, C. E. Stevens Company, a corporation, C. E. Stevens Tacoma Company, a corporation, and C. E. Stevens Company of Oregon, a corporation, joining in this motion for the convenience of the Court and the parties, severally and each on its own behalf and interest, and not one for the other nor jointly, and representing that the defendants herein, on page 21 of Defendants' Opening Brief, have raised the question of the

meaning of the terms "independents" and "independent plant owners," and that the desire of the plaintiff companies is to clearly indicate the meaning of the said terms and similar terms, used in the Second Amended Complaint, to the end that the real issues in the cause may be clearly set forth, respectfully move the Court as follows:

I.

That paragraph VIII of the Second Amended Complaint in the above-entitled cause be amended by the addition *ty* interlineation of the following sentence at the end of line 6, page 15, of the said Second Amended Complaint:

"Wherever used in this complaint, the terms 'independents', 'independent plant owners', 'independent plants' and 'independent companies' include and are intended to embrace the appropriate plaintiff company."

II.

That, in the alternative, in the event it is impracticable to accomplish the said amendment by interlineation, the plaintiffs be given leave to file an amended complaint in the cause, embodying the additional sentence set forth in the preceding paragraph.

JONES & BRONSON
H. B. JONES
ROY E. JACKSON
Attorneys for Plaintiffs
610 Colman Building
Seattle, Washington.

Copy received and it is agreed that the foregoing motion may be considered at the time of the presentation of the order sustaining the demurrer.

Dated May 8, 1939.

STEPHEN V. CAREY
One of Attorneys for Defendants.

The foregoing motion was, before entry of the judgment herein, submitted, considered and granted, this 8th day of June, 1939, to which ruling defendants except, and exception is hereby noted and allowed.

Dated this 8th day of June, 1939.

JOHN C. BOWEN
Judge

United States of America,
Western District of Washington—ss:

CERTIFIED COPY

I, Elmer Dover, Clerk of the United States District Court in and for the Western District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Motion to Amend Second Amended Complaint & Order Thereon now remaining among the records of the said Court in my office at Seattle.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the afore-

said Court at Seattle, Washington this 19th day of August, A. D. 1939.

[Seal] ELMER DOVER
Clerk.

By R. B. ALLEN
Deputy Clerk.

[Endorsed]: Filed June 8, 1939. Elmer Dover, Clerk.

[Endorsed]: Filed Aug. 25, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, September 15, 1939.

Before: Wilbur, Haney and Healy, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered motion of appellees to add to the transcript of record herein the certified copy of Second Amended Complaint granted.

Further Ordered appeal herein argued by Mr. H. B. Jones, counsel for appellants, and by Mr. Herbert W. Clark, counsel for appellees, and submitted to the court for consideration and decision, with leave to counsel for appellant to file reply brief in 5 days.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, February 19, 1940.

Before: Wilbur, Haney and Healy.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, Ordered that the typewritten opinion, concurrence and dissenting opinion, this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

OPINION

Before: Wilbur, Haney and Healy, Circuit Judges.

Wilbur, Circuit Judge:

This is an appeal from an order of the District Court sustaining appellees' demurrer to appellants' complaint without leave to amend on the ground that no cause of action was alleged. The action was

filed under Section 7 of the Sherman Anti-Trust Act (Act of July 2, 1890, Chap. 647; 26 Stat. 209, as superseded by Act of Oct. 15, 1914, Chap. 323; §4, 38 Stat. 731; 15 U.S.C.A. §15).[1] Both parties are engaged in advertising by means of billboards.

The ruling of the District Court was based on the decision of this court in Foster & Kleiser Co. v. Special Site Sign Co., 85 F. (2d) 742, an action against the same defendant by another competitor. In that case plaintiff sought damages under Section 7 of the Sherman Anti-Trust Act based upon similar activities by the defendant therein as are alleged in the case at bar. In the Special Site Sign Company case, supra, the plaintiff, in an effort to support federal jurisdiction under the Sherman Anti-Trust Act, alleged such interstate activities by the defendant as the shipping by it of designs, posters, lithographs, stencils and paints from one state to another. It also alleged the effect of outdoor advertising in stimulating interstate trade. It al-

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[1]Section 7 of the Sherman Anti-Trust Act, reads as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (July 2, 1890, C.647, §7, 26 Stat. 210, as superseded by Act of Oct. 15, 1914, C.323, §4, 38 Stat. 731, 15 U.S.C.A. §15.)

leged that the defendant attempted to monopolize the outdoor advertising business by acquiring control of numerous outdoor advertising companies by leasing of outdoor advertising sites at rentals in excess of their true worth, by leasing more sites than were intended to be used in the business, by fraudulent activities leading to the cancellation of leases of advertising sites obtained by plaintiffs, and by other unfair business practices designed to squeeze out competitors. (See, Foster & Kleiser Co. v. Special Site Sign Co., 85 F.(2d) 742, 753, supra.) This court held that the complaint did not state a cause of action. It was held that the outdoor advertising business, as a whole, could not be viewed as interstate commerce merely because there was incidentally involved therein the shipment of posters, lithographs, etc., in interstate commerce. It was held that no acts were alleged which directly affected the interstate trade in posters or lithographs and that the acts of the alleged conspirators in inflicting the damage in no way related to the allegations of a conspiracy to restrict interstate commerce in posters and lithographs, etc. It was pointed out in that decision that all the acts alleged as means for carrying out the conspiracy were adopted to the injury or destruction of the plaintiff's business in its intrastate aspects.

In the case at bar, the complaint sets out the general methods of business of companies inoived in the outdoor advertising business. It is alleged that the advertiser generally contracts with a lithog-

rapher for posters to be used in the advertising campaign. Advertising agencies solicit contracts of advertisers for the placing of the posters upon billboards. These advertising agencies are organized into the National Outdoor Advertising Bureau, Inc. This bureau contracts with bill posting companies called "plant owners" which control sites for bill boards for the execution of the contracts secured by the agencies. Since 1927 bill posting companies have been organized into the Outdoor Advertising Association of America, Inc., a consolidation of the Associated Bill Posters and Distributors of the United States and Canada and the Outdoor Advertising Association of America. These associations grant a "franchise" in each community where a billboard advertising is done. Foster & Kleiser control 600 franchises and the General Outdoor Advertising Company, Inc., an association of bill posters, organized in 1924, controls 1000 franchises. It is alleged that the Outdoor Advertising Association, Inc., is dominated and controlled by the General Outdoor Advertising Company and by Foster & Kleiser Co. The appellants are "independent" operators and do not belong to the Outdoor Advertising Association of America, Inc. The National Outdoor Advertising Bureau (association of advertising agencies) executes all advertising contracts secured by it through the General Outdoor Advertising Company which company assigns all contracts calling for posting or painting in the Pacific Coast area to Foster & Kleiser Company for execution.

That the activities of these different companies frequently overlap is shown by the allegations of the complaint that contracts for outdoor advertising are made not only by agencies but by bill posting companies. It should be noted that the General Outdoor Advertising Company is not made a party to this action.

The conspiracy alleged is one to monopolize all branches of the outdoor advertising business. As in the Special Site Sign case, it is alleged that in furtherance of the conspiracy the conspirators paid for advertising sites in excess of their worth, caused the cancellation of leases of appellants and did other acts designed to secure for app llees a monopoly of advertising contracts and sites upon which to execute the same. It is also alleged that appellees conspired to place restraints upon interstate trade in posters and lithographs and that the conspirators refused to post lithographs of manufacturers who sold or furnished samples to independent poster plants.

It is claimed, and the basic assumption of the complaint is, that the bill posting business as a whole must be considered as interstate commerce and, consequently, that a monopoly of this business in any of its aspects is a violation of the Sherman Anti-Trust Act. It is also claimed and alleged that appellees conspired to restrain and restrict the shipment of posters and lithographs in interstate commerce.

Insofar as the contention that appellees conspired to restrain the interstate commerce in posters and lithographs is concerned, an analysis of the complaint as a whole clearly shows that the main object of the alleged conspirators was the securing of control of the bill posting business in its intrastate aspects involving the securing of advertising contracts and billboard sites upon which to execute the same.[2] It clearly appears from the complaint that the principal business of the appellee, Foster & Kleiser Company, was the operating of outdoor advertising plants and the securing of advertising contracts, not the sale of posters or lithographs. These materials are sold by lithographers who are located in states other than the Pacific Coast area, principally in Kentucky, Ohio and Illinois. In view of these allegations it can hardly be said that appellees' primary object was to monopolize the trade in posters. It is true, as we have stated, that appellants alleged that the conspiracy in part involved the preventing of appellants from obtaining posters and that in order to effect this result the Outdoor Advertising Association of America, Inc., refused

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[2]Obviously the securing of local billboard sites and the posting of advertising matter thereon are local transactions. Nor does the fact that billposting contracts are made between persons residing in different states transform the transaction into an interstate one. Ware and Leland v. Mobile County, 209 U.S. 405; Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U.S. 436; Pacific Railways Advertising Co. v. Conrad, 168 Cal. 91.

to post lithographs if the lithographer dealt with non-association members. As to the effect of this allegation, we quote from appellees' brief:

> "At this point it may be conceded that the conspiracy just described and the means by which it was to be effected would be unlawful under the Sherman Act. (Ramsay Co. v. Bill Posters Association (1923), 260 U.S. 501, 67 L.Ed. 368, 43 S.Ct. 167.) However, 'in a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy but upon the injuries resulting therefrom'. Special Site case, supra, 85 F.2d 742, at page 750. Therefore, we must next inquire whether the second amended complaint contains sufficient allegations of fact showing that this alleged conspiracy was made effective to the injury of appellants."

Insofar as this conspiracy is concerned, it is not alleged that it was successful or effective to injure appellants' business. That is, it is not definitely and explicitly alleged that appellants were unable to secure posters necessary for fulfilling their advertising contracts. The appellants, after alleging that the action of the conspirators in refusing to post lithographs of manufacturers who dealt with independent plant owners was for the purpose of hampering and preventing such owners, including the plaintiff, from securing lithographs and posters, alleged:

"That thereby the said independents were obstructed and hindered in their business and prevented from giving a full and adequate outdoor advertising service to their customers, competition with the association members and said conspirators was hindered and obstructed, and the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained."

This is not a definite allegation that appellants were unable to obtain posters or lithographs with which to execute their advertising contracts because of the activities of appellees or that advertisers seeking to deal with appellants were unable to secure posters for posting by appellants. If that was in fact the case, appellants should have alleged it to be so, definitely and clearly. An analysis of the complaint as a whole shows that the alleged damage to appellants flowed not from inability of appellants to obtain posters but from inability to obtain advertising contracts and billboard sites upon which to execute the same.[3]

[3]As we have stated, the alleged activities of the appellees complained of related principally to the obtaining of a monopoly of advertising sites and the securing of a monopoly of outdoor advertising contracts. As to damages, it is alleged:

"That the aforesaid acts, on the part of the defendant company and the other defendants herein named, were in unreasonable restraint of trade and commerce among the several states

We do not hold that because the ultimate object of a conspiracy is to obtain a monopoly of intrastate business or commerce such an object can be brought about by a restraint of interstate commerce

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and did constitute a monopoly and were and are an attempt to monopolize the said trade and commerce, and did create a monopoly thereof greatly to the damage of the plaintiff company, and that the plaintiff company was unreasonably restrained in its trade and competition with defendant in the outdoor advertising business, as heretofore defined and explained, all of which was injurious to the plaintiff company and excluded the plaintiff company from fair competition in the said trade and commerce, and because of such inability to compete in the said trade and commerce during the periods mentioned, to and including the date of the commencement of this action, the plaintiff company has been damaged in that its business was rendered unprofitable, and the profits of its said trade and commerce have diminished, and the plaintiff company has suffered loss and been damaged thereby, from said year 1924 to the time of filing the complaint, and furthermore, as set forth more particularly in paragraph XV hereof, the plaintiff company has suffered great loss of profits and moneys invested and damage by reason of its inability to engage in said trade and commerce in the City of San Francisco and the State of California, all in the sum of three hundred and fifty thousand dollars ($350,000.00).

"Wherefore, plaintiff, C. E. Stevens Company, demands judgment against defendants for the sum of three hundred and fifty thousand dollars ($350,000.00), and treble damages, together with reasonable counsel fees, besides the costs and disbursements of this action."

without violating the Sherman Anti-Trust law. This is not the law. See, Bedford Cut Stone Co. v. Journeymen S. C. Ass'n., 274 U.S. 37, 47.

In the case at bar, as we have pointed out, although a conspiracy to control interstate trade in posters is alleged as one of the means of acquiring monopoly in the billposting business, it was not alleged that such a conspiracy to restrain the interstate movement of posters was effective and that appellants were damaged thereby. By the device of alleging a conspiracy to restrain interstate trade in posters and lithographs without alleging that this conspiracy was effective and worked to the damage of appellants, they cannot recover damages arising from the alleged conspiracy to prevent the acquisition and use of billboards and to obtain a monopoly of advertising contracts, activities intrastate in character, when it is clear that the purpose of the conspiracy as a whole is a monopoly of intrastate business.

In Ramsay Co. v. Associated Billposters, 260 U.S. 501, principally relied upon by appellants, the conspiracy charged was not only one to monopolize the billposting business in its intrastate aspects, but also one to "dominate and control all trade and commerce in posters" within such limits. And the manufacturers of posters had "by threats of withdrawal of patronage * * * been prevented from furnishing posters to independent billposters or to advertisers desiring to do business with independents except upon prohibitive terms." Advertisers

were not permitted to purchase "stock" posters unless willing to have them displayed upon boards of members and independent billposters could not purchase such matter at all. Thus, there was present in that case the essential element absent in the case at bar, that is, an effective control of the interstate trade in posters. There would be, of course, some incidental effect on the interstate trade in posters and lithographs by the monopoly of the intrastate aspects of the outside advertising business. But the primary object of the conspiracy as alleged was the control of the intrastate business and such activities were outside the scope of the Sherman Anti-Trust law, supra. In Ramsay Co. v. Associated Billposters, supra, it was stated:

> "The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiffs, and to enrich the members by demanding non-competitive prices."

In Bedford Cut Stone Co. v. Journeymen S. C. Ass'n., 274 U.S. 37, supra, it was stated:

> "The product against which the strikes were directed, it is true, had come to rest in the respective localities to which it had been shipped, so that it had ceased to be a subject of interstate commerce, * * *; and interferences for a purely local object with its use, with no inten-

> tion, express or implied, to restrain interstate commerce, it may be assumed, would not have been a violation of the Anti-Trust Act * * *; United Mine Workers v. Coronado Co., 259 U.S. 344, 410-411. But these interferences were not thus in pursuit of a local motive,—they had for their primary aim restraint of the interstate sale and shipment of the commodity. Interstate commerce was the direct object of attack 'for the sake of which the several specific acts and courses of conduct [were] done and adopted.'"

In Coronado Coal Company v. United Mine Workers of America, 268 U.S. 295, 310, the Supreme Court said:

> "The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture of production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act."

See also, Local 167, etc. v. United States, 291 U.S. 293, 297. In all these cases it is held that when acts intrastate in character are relied upon to bring a case within the scope of the Sherman Anti-Trust

Act, supra, such acts must be done with the primary intention of monopolizing or burdening the free movement of goods in interstate commerce. As we have stated, it is clear from a reading of the complaint as a whole that the purpose of the conspiracy alleged was not a monopoly of the outdoor advertising business in its interstate aspects, that is, the control of poster or lithograph trade but, rather, the control of the local business of securing advertising contracts and billposting.

The other contention of appellants, that the outdoor advertising business as a whole must be considered as interstate commerce per se, was dealt with in our decision in Foster & Kleiser Co. v. Special Site Sign Co., supra. We found no merit in it. It is now contended, however, that under the "expanded concept of interstate commerce" as announced in recent decisions of the Supreme Court arising under the National Labor Relations Act, (Act of July 5, 1935, 49 Stat. 449, 29 U.S.C.A. §151, et seq; N.L.R.B. v. Jones & Laughlin S. Corp., 301 U.S. 1; N.L.R.B. v. Fruehauf Trailer Co., 301 U.S. 49; N.L.R.B. v. Friedman-Harry Marks Clothing Co., 301 U.S. 58; Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453; N.L.R.B. v. Fainblatt, 306 U.S. 601) a cause of action was stated under the Sherman Anti-Trust Act, supra.

Under the National Labor Relations Act, supra, the National Labor Relations Board is empowered to prevent certain described unfair labor practices affecting commerce. (§10 cf the Act, 29 USCA

§160(a)). The term "affecting commerce" is defined in the National Labor Relations Act as meaning "in commerce or, burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." (§2 of the Act, 29 USCA §152(7)). The questions discussed in the cases cited by appellants arising under the National Labor Relations Act have to do with the power of Congress to exercise control over activities which separately considered are intrastate but which, because of their close and susbtantial relation to interstate commerce, have an injurious effect upon it. The right of Congress to deal with these activities is based upon its power to protect interstate commerce when injuriously affected by acts which are local in character. This is an entirely different question than presented here. The question in the case at bar is not the extent of the power of Congress over intrastate activities affecting interstate commerce, but whether or not the conduct complained of is within the scope of the Sherman Anti-Trust Law. The question is what Congress has declared to be illegal under the Sherman Anti-Trust Law.[4] As we have stated, the

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[4]Section 1 of the Sherman Anti-Trust Act, 15 USCA §1, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, IN RESTRAINT OF TRADE OR COMMERCE

Supreme Court, in determining what Congress intended to forbid by the enactment of the anti-trust laws, has held that activities, intrastate in character, not motivated by the primary purpose of monopolizing or restraining commerce among the several states, are not covered by such laws although such activities might incidentally affect interstate commerce. (United Mine Workers v. Coronado Co., 259 U.S. 344, supra; Coronado Coal Co. v. United Mine Workers of America, 268 U.S. 295; Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n., 274 U.S. 37, supra; Local 167 v. United States, 291 U.S. 293, supra; Apex Hosiery Co. v. Leader, 90 F.2d. 155.)

The decisions of the Supreme Court in United States v. Rock Royal Co-operative, Inc., 59 S.Ct.

AMONG THE SEVERAL STATES, or with foreign nations, is declared to be illegal. * * *"

Section 2 of the Sherman Anti-Trust Act, 15 USCA §2, provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize ANY PART OF THE TRADE OR COMMERCE AMONG THE SEVERAL STATES, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

Section 1 of the Clayton Act, 38 Stat. 730, 15 USCA §12, provides:

"'Commerce,' as used in sections 12 to 27, inclusive, of this chapter, means trade or commerce among the several states * * *."

The Anti-Trust Act does not declare unlawful conspiracies to control local trade which may incidentally affect interstate commerce.

995, and Currin v. Wallace, 306 U.S. 1, cited by appellants, have to do with the validity of the Agricultural Marketing Agreement Act of June 3, 1937 (50 Stat. 246, 7 USCA §601, et seq), and the Tobacco Inspection Act of August 23, 1935, (49 Stat. 731, 7 USCA §§511 to 511q) respectively, and have no bearing on the case at bar.

Appellants contend that even if the demurrer were properly sustained the court erred in dismissing the action without leave to further amend. Leave was granted to amend to clarify the complaint. No other amendment was requested. The appellees contend that in the absence of a request it was not error to refuse leave to amend, citing in support of their contention, Rule 15a of the Federal Rules of Civil Procedure, and Simpkins Federal Practice Rules of Civil Procedure, 3d ed. p. 313, §356. The amendment allowed to clarify certain terms used in the complaint did not substantially change the situation of the parties. The matter of giving leave to amend is one in the sound discretion of the trial court. But leave is to be "freely given when justice so requires". (Rule 15a, F.R. C.P., supra.) The reasons given by the trial court for denying leave to amend are persuasive here that there was no abuse of discretion.[5] We place

[5] "This case having on both sides and for a long time had the active attention of eminent counsel who have been advised of the progress and outcome of the similar cases herein and in the briefs cited, and plaintiffs' complaint having been amended

our decision sustaining the trial court in refusing leave to amend upon the ground that there was no abuse of discretion in such refusal and not upon the ground that appellants failed to request leave to amend after the court had announced that the demurrer to the complaint would be sustained without leave to amend.

Affirmed.

Healy, Circuit Judge, concurs in the result.

Haney, Circuit Judge, Dissenting.

Unable to agree with either the reasoning or the result obtaining in the majority opinion, I am constrained to dissent and hereby set forth my reasons therefor.

I dissent upon the ground that the majority too narrowly applies the Sherman Anti-Trust Act by reliance on Foster & Kleiser Co. v. Special Site Sign Co., 9 Cir., 85 F(2d) 742. I believe that case does not control here for two reasons. The first is that while the rule regarding the Congressional power over commerce has not been enlarged, the application of the exercise of the power, the anti-trust act, has been "expanded", as witness the Labor Board cases, cited in the majority opinion. Both the Sherman Anti-Trust Act, and the National Labor Relations Act cover not only interstate commerce, but intra-state activities which "directly"

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twice already, the demurrer to the second amended complaint will be as to all defendants sustained without leave to amend."

affect such commerce. Labor Board v. Jones & Laughlin, 301 U.S. 1, 37-41. There should be no discrimination in the application of the two acts. I do not agree with the majority in its differentiation with respect to the right and power of Congress to protect interstate commerce by means of the National Labor Relations Act on the one hand, and the scope of the Sherman Anti-Trust Act on the other. Both acts stem from the same constitutional source, each striving to protect the same kind of commerce. If possible they should each be construed to effectuate their purpose, but this cannot be done by applying diametrically opposed constructions, by seeking "mathematical or rigid formulas",[1] nor by applying distinctions based upon form and not upon substance.

In this connection, I think it should be stated that the majority's attempt to distinguish the labor board cases, on the ground that in such cases the court was considering the power of Congress over interstate commerce, whereas here we are merely considering the scope of the anti-trust act, seems to require little discussion. It was necessary to determine the scope of the National Labor Relations Act before its constitutionality could be determined. Labor Board v. Jones & Laughlin, supra, 29. Thus the same question was in fact considered in the labor board cases, as is presented here. The ma-

[1]Santa Cruz Co. v. Labor Board, 303 U.S. 453, 467.

jority also state that intrastate activities, lacking an intent to violate the statute, are not within the anti-trust laws "although such activities might incidentally affect interstate commerce". The meaning of the statement is not quite clear. The phrase is broad enough to include an incidental "direct" effect upon interstate commerce, and if such meaning was intended, I think it is clearly erroneous.

The second reason why Foster & Kleiser Co. v. Special Site Sign Co., supra, is not controlling, is that when we are considering the applicability of an exercise of the Congressional power over commerce, I think each case must be decided on its own facts.[2]

A demurrer was sustained to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. The complaint stated a cause of action if it alleged facts showing: (1) jurisdiction in the court over the subject-matter; (2) ownership of a right by appellants; (3) violation of such right by appellees; and (4) damage or injury to appellants resulting from such violation. United States v. McIntire, 9 Cir., 101

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[2]Compare: Sugar Institute v. United States, 297 U.S. 353, 600; Kansas City v. Kansas City Ry., 240 U.S. 227, 333; Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 85; Santa Cruz Co. v. Labor Board, 303 U.S. 453, 467. It seems probable that it was upon this theory that Schechter Corp. v. United States, 295 U.S. 495, and Carter v. Carter Coal Co., 298 U.S. 238, were held to be "not controlling" in Labor Board v. Jones & Laughlin, 301 U.S. 1, 40. See also: Santa Cruz Co. v. Labor Board, 303 U.S. 453, 466, 469.

F(2d) 650, 653; United States v. Humboldt Lovelock Irr. Light & P. Co., 9 Cir., 97 F(2d) 38, 42. If these elements appear in the complaint, then the demurrer was erroneously sustained.

First. That the complaint states facts showing that the trial court had jurisdiction of the cause of action is not questioned and need not be discussed.

Second. The right claimed by appellants is to carry on its business free from injury caused by a violation of the Sherman Anti-Trust Act by appellees. 15 USCA §15. In other words, appellants had the right to be uninjured by a violation of the Sherman Anti-Trust Act, and if they were injured by a violation of such act by appellees, then appellees are liable. This element, (i.e., the ownership of such right by appellants) of necessity appears in the complaint.

Third. To determine whether appellees injured appellants by violating the Sherman Anti-Trust Act, it is necessary to determine what is prohibited by such act, and whether appellees took any prohibited action.

Prohibitions of the act. Section 1 of the act (15 USCA §1) declares illegal every "contract, combination * * * or conspiracy in restraint of trade or commerce" and declares it to be a misdemeanor for any person to "make any such contract or engage in any such combination or conspiracy". Section 2 (15 USCA §2) declares: "Every person who shall monopolize, or attempt to monopolize, or com-

bine or conspire with any other person or persons, to monopolize any part of the trade or commerce * * * shall be deemed guilty of a misdemeanor * * *" . While the meaning of the words "contract", "combination", "conspiracy", "combine", and "conspire" is not particularly recondite, the meaning of "in restraint of trade" and "monopolize" is more obscure, and it is the meaning of the latter words with which we are concerned.

It has been said that "no statute ever passed since the foundation of the government has been the subject of more difference of opinion or the cause of more perplexity" than the act in question,[3] and that it "is necessarily vague, because, in men's mind, the evil dreaded is vague, and like words, therefore, have been used to express it".[4]

The bill introduced by Senator Sherman regarding the subject was coolly received by the judiciary committee to which it was referred, and Senator Hoar drafted the bill which became the act in question. His statements, and the debates in Congress disclose that he intended that the words "restraint of trade" and "monopolize" should be given their

[3]William B. Hornblower, "Anti-Trust" Legislation and Litigation (1911), 11 Col. L. Rev. 701, 702.

[4]William F. Dana, "Monopoly" Under The National Anti-Trust Act (1894), 7 Harv. L. Rev. 338.

technical meaning known to the common law.[5] However, in the second case under the Sherman Act to come before the Supreme Court, it held that "debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body". United States v. Freight Association, 166 U.S. 290, 318. Compare the statement in Fed. Communications Comm. v. Pottsville Broadcasting Co., ... U.S. ..... January 29, 1940, that "the author of a document is ordinarily the authoritative interpreter of its purposes." If there was a committee report (a question which I am unable to determine here), and if it disclosed the intent mentioned, it is possible that such intent might yet be upheld, in view of the widespread use of such reports in the determination of Congressional intent.

Other than by the statements in Standard Oil Co. v. United States, 221 U.S. 1, the Supreme Court seems to have made no effort to distinguish between §§1 and 2 of the act.[6] It has been sug-

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[5]Robert L. Raymond, The Federal Anti-Trust Act (1910), 23 Harv. L. Rev. 353, n. 1;
Edward A. Adler, Monopolizing At Common Law And Under Section Two Of The Sherman Act (1917), 31 Harv. L. Rev. 246, 247-250;
Louis B. Bondin, The Sherman Act And Labor Disputes (1939), 39 Col. L. Rev. 1283, 1285 et seq.

[6]Clarence E. Eldridge, A New Interpretation Of The Sherman Act (1914), 13 Mich. L. Rev. 1 and 113.

gested that the technical common law meaning of the words in §§1 and 2 be used.[7] Accordingly it has been argued that §1 reaches only those restrictions placed *voluntarily* by one on his right to carry on his trade or calling, and that §2 reaches involuntary restraints.[8] Such theory, however, has been rejected.[9] It has also been suggested that "restraint of trade" is "the equivalent of restraint of competition".[10] That theory has likewise been rejected.[11] It has also been suggested that the word "monopolize" in §2, is synonymous with the common law offenses known as engrossing, forestalling and regrating.[12] That theory seems also to have been rejected[13]

What, then, is the meaning of "restraint of trade" and "monopolize"? By the statements that those words were "synonymous"[14] and reached "volun-

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[7]Eldridge, supra, note 6; Albert M. Kales, Good And Bad Trusts (1917), 30 Harv. L. Rev. 830, 843.

[8]Eldridge, supra, note 6.

[9]United States v. Patten, 226 U.S. 525, 541.

[10]Hornblower, supra, note 2, p. 705.

[11] Chicago Board of Trade v. United States, 246 U.S. 231, 238;
Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360;
Thornton, Combinations In Restraint Of Trade, 333, §147, 339a, §150a.

[12]Adler, supra, note 4, p. 259, 260.

[13]Standard Oil Co. v. United States, 221 U.S. 1, 57, 61.

[14]Standard Oil Co. v. United States, 221 U.S. 1, 61.

tary" as well as "involuntary" restraints,[15] the Supreme Court, as a practical matter, has, it seems, obliterated any distinction between §§1 and 2 of the act, and "has treated the prohibitions of Section 2 as substantially comprehended within the prohibitions of Section 1."[16] As a result of the language in Standard Oil Co. v. United States, 221 U.S. 1, 58-62, (which, if dicta, was deliberate), it seems that about all that can be said is that the statutes prohibit (1) the means of reaching a result, and (2) any attempt to reach such result; and the result mentioned is the evil thought to arise from the acts covered by the general words "restraint of trade" and "monopolize" mentioned therein, p. 52. Wilder Mfg. Co. v. Corn Products Co., 236 U.S. 165, 174.

Stating it more plainly, the statutes prohibit (1) the attempt to acquire, and (2) the acquisition of, power to fix unreasonable prices, unreasonably limit production, or unreasonably deteriorate the quality of articles, which might have a direct effect on interstate or foreign commerce. Considering the superb uncertainty and lack of precision in the rule, there seems to be justification for the statement that the "existing confusion as to the distinction between sections 1 and 2 of the act, and what

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[15]United States v. Patten, 226 U.S. 525, 541.

[16]See: Brief For The United States On The Meaning Of The Sherman Act, in United States v. Aluminum Company of America, Equity No. 85-73, in the United States District Court for the Southern District of New York.

the elements under each section are, would seem to invite and justify more specific statements from the Supreme Court with respect thereto". Lynch v. Magnavox Co., 9 Cir., 94 F(2d) 885, 888.

While the indefiniteness of the rule has been repeatedly and consistently decried[17] it is recognized that the application thereof may be settled only "by the traditional case-by-case method of our common law".[18] In that respect, the anti-trust statutes do not differ from any other statutes. The difficulties confronting the enforcing agency have been pointed out.[19] While some of these do not concern the judiciary, the charge of indefiniteness in the statement of the rule by the courts is one of serious import and should be rectified. However, since the decisions of the Supreme Court are binding on this court, such decisions prevent an expression of independent opinion as to the meaning of the statutes. I have set forth only what I believe the Supreme Court has stated the meaning of the statutes to be.

The alleged facts. Appellants are known as "independent" owners of plants used for outdoor advertising displays. Appellees are members of an

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[17]Anual Reports of the Attorney-General: for 1936, p. 21; for 1937, pp. 35, 39; for 1938, pp. 57, 59, 60.

[18]Annual Report of the Attorney-General for 1939, p. 39;
Thurman W. Arnold, Antitrust Activities Of The Department Of Justice (1939), 19 Ore. L. Rev. 22, 31.

[19]See note 15.

association and control 90% of the outdoor advertising in the Pacific Coast area. The complaint alleges that appellees entered into a conspiracy, the purposes of which were: to prevent appellants and others from engaging in the posting business, from securing and executing contracts for national posting business, and from securing posters with which to conduct such business; to prevent lithographers from supplying posters to appellants and others; and to prevent appellants and others from securing facilities to furnish an advertising service to advertisers.

From these allegations, it can be clearly seen that the end sought by appellees was the acquisition of power whereby they could fix unreasonable prices, and unreasonably limit the number of competitors.

The manner in which these objects were accomplished are alleged, but it is unnecessary here to relate them because the kind of means used is unimportant. The result of the means used is the thing of importance. In this connection it is alleged that appellees intended to restrain trade and monopolize when they formed the conspiracy and carried out the object thereof. If, by necessary operation of the conspiracy, there is an actual restraint, the statute is violated,[20] the actual intent being im-

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[20] Addyson Pipe & Steel Co. v. United States, 175 U.S. 211, 244;
Swift and Company v. United States, 196 U.S. 375, 395;
United States v. Reading, 226 U.S. 324, 357;
Bedford Co. v. Stone Cutters Ass'n, 274 U.S. 37, 46.

material.[21] Intent, however, is material when the acts done "tend" to reach the prohibited result.[22] If it is doubtful whether the acts actually "tend" to monopolize, it will be presumed that they do, if there is an actual intent to monopolize,[23] or if such an intent can be inferred from the extent of the control thereby secured over the commerce affected as well as by the method which was used.[24] I am not, therefore, in accord with the expressions of the majority with respect to rules regarding "intent" because if an actual restraint is accomplished, the intent with which either intrastate or interstate acts are done, is immaterial, and if the acts only "tend" to restrain, then the intent with which such acts are done is material regardless of whether the acts are intrastate or interstate in character.

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[21] Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 39;
United States v. Patten, 226 U.S. 525, 541;
Thomsen v. Cayser, 243 U.S. 66, 88;
Paramount Famous Corp. v. United States, 282 U.S. 30, 44.

[22] United States v. American Oil Co., 262 U.S. 371, 388;
Maple Flooring Ass'n v. United States, 268 U.S. 563, 567;
Thornton, Combinations In Restraint Of Trade, 417b, §200.

[23] Swift and Company v. United States, 196 U.S. 375, 395;
Coronado Co. v. U. M. Workers, 268 U.S. 295, 310.

[24] United States v. St. Louis Terminal, 224 U.S. 383, 394;
United States v. Reading, 226 U.S. 324, 357.

The trade or commerce affected must be interstate or international,[25] and the effect thereon must be direct or immediate, and not indirect or incidental.[26] We must therefore determine whether accomplishment of the object of the conspiracy had such an effect here. The majority, in my opinion, has confused the "purpose" of the conspiracy with the means used to "accomplish" it. The fact that the conspiracy was accomplished by acts which if separately considered, would be intrastate, is immaterial.[27] "It is the effect upon commerce, not the source of the injury, which is the criterion".[28] Each case presents its distinctive questions arising from facts therein involved, as to whether the effect is direct or indirect.[29]

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[25]United States v. Joint Traffic Association, 171 U.S. 505, 568;
Anderson v. United States, 171 U.S. 604, 615;
United States v. Patten, 226 U.S. 525, 542;
Blumenstock Bros. v. Curtis Pub. Co., 252 U.S. 436, 441.

[26]United States v. Joint Traffic Association, 171 U.S. 505, 568;
Anderson v. United States, 171 U.S. 604, 615;
United States v. Patten, 226 U.S. 525, 545.

[27]Labor Board v. Jones & Laughlin, 301 U.S. 1, 37, 38;
Santa Cruz Co. v. Labor Board, 303 U.S. 453, 466.

[28]Labor Board v. Jones & Laughlin, supra, 32.

[29]Labor Board v. Jones & Laughlin, supra, 32;
Santa Cruz Co. v. Labor Board, 303 U.S. 453, 467.

The complaint contains many allegations that the accomplishment of the conspiracy "obstructed and hindered" appellants in their business; and that "the free movement in interstate commerce of posters, lithographs, painted designs and contracts for outdoor advertising was monopolized, attempted to be monopolized, and was unreasonably restrained". It was also alleged that "in almost every case" the poster advertising contracts were "agreements between the parties thereto to ship posters, lithographs, designs, stencils and other advertising material from one of the states of the United States to another state". It seems apparent to me that the complaint contains sufficient allegations to show obstructions to the shipments mentioned, and therefore a decrease in interstate commerce. In view of Santa Cruz Co. v. Labor Board, supra, and Edison Co. v. Labor Board, 305 U.S. 197, 221, I think it inevitably follows that the effect was "direct".

Fourth. The last element of the cause of action, mentioned above, is the damage or injury to appellants resulting from the violation of the statute by appellees. I am not in accord with the holding of the majority, that there are no allegations to show that the conspiracy injured appellants' business. The following quotation, in my opinion, clearly controverts such holding:

> "That the aforesaid acts * * * did constitute a monopoly * * * greatly to the damage of * * * [appellants], and that the [appellants] company was unreasonably restrained in

its trade and competition with [appellees] in the outdoor advertising business * * * all of which was injurious to the [appellants] company and excluded [it] * * * from fair competition in the said trade and commerce, and because of such inability to compete in the said trade and commerce * * * the [appellants] company has been damaged in that its business was rendered unprofitable, and the profits of its said trade and commerce have diminished, and * * * [it] has suffered loss and been damaged thereby * * *"

In addition there are other allegations of injury.

For these reasons I think the judgment should be reversed.

[Endorsed]: Opinion, Concurrence and Dissenting Opinion. Filed Feb. 19, 1940. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9215

C. E. STEVENS COMPANY, a corporation, et al.,
Appellants,

vs.

FOSTER & KLEISER CO., a corporation, et al.,
Appellees.

JUDGMENT

Upon appeal from the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellees and against the appellants.

It is further ordered and adjudged by this Court that the appellees recover against the appellants for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Feb. 19, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. Jones & Bronson counsel for the appellants, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 8, 1940; and in the event the petition for a writ of certiorari to be made by the appellants herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

BERT EMORY HANEY
United States Circuit Judge

Dated: San Francisco, California,
March 21, 1940.

[Endorsed]: Filed Mar. 21, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred twelve (112) pages, numbered from and including 1 to and including 112, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of March, 1940.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 6, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned for argument immediately following No. 870, The United States of America vs. Hutcheson, et al.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9420)